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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 481

ELLIS CARP, *et al.*,

Appellants,

—v.—

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

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INDEX

	Page
Jurisdictional Statement	1
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes, and Regulations Involved	2
Questions Presented	3
Statement of the Case	4
1. Optometry Practice in Texas	5
2. Adoption of the Professional Responsibility Rule	6
3. What the Rule Does	9
4. History of These Proceedings	10
The Questions Are Substantial	13
I. The Rule, Because of the Procedures by Which It Was Adopted, Deprives the Appellants of Their Property Without Due Process of Law	13
A. The Rule Was Adopted by Economically Interested Private Persons and Without Any Act of Judgment by Officials Concerned With the Public Interest	14
B. Adoption of the Rule Was Premised on an Unreasonable Presumption	18
II. The Rule Is Void Because It Was Adopted Pursuant to a Conspiracy to Put the Appellants Out of Business	20

Page

A. The Participation of the Board Members in the Conspiracy Denied Appellants Due Process of Law 21

B. The Conspiracy Renders the Rule Invalid Under the Supremacy Clause as a Violation of the Sherman Act 24

Conclusion 27

APPENDICES:

Appendix A—Opinions Below 1a

1. In the Supreme Court of Texas 1a
2. In the Texas Court of Civil Appeals 27a
3. In the Supreme Court of Texas, on Writ of Mandamus (1965) 39a

Appendix B—Judgment of the Supreme Court of Texas and Order Denying Rehearing 63a

Appendix C—State Statute and Regulations Involved 65a

1. Texas Revised Civil Statutes, Article 4556 .. 65a
2. Professional Responsibility Rule 66a
3. Rule Making Procedure Rule 71a
4. Advisory Committee Resolution 72a

CITATIONS

CASES:

Associated Press v. *United States*, 326 U.S. 1 (1945) 25

Braniff Airways v. *Nebraska State Bd.*, 347 U.S. 590 (1954) 21

Carp v. *Texas State Bd.*, 401 S.W.2d 639 (Tex. Civ. App. 1966) 1, 6, 12

Page

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 14, 15

Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 25
Eubank v. *Richmond*, 226 U.S. 137 (1912) 15, 16

Fashion Originators' Guild of America v. *FTC*, 312 U.S. 457 (1941) 25
Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) 23

Glicker v. *Michigan Liquor Control Comm'n*, 160 F.2d 96 (6th Cir. 1947) 22
Griffin v. *School Bd.*, 377 U.S. 218 (1964) 23
Group Health Ins. v. *Howell*, 40 N.J. 436, 193 A.2d 103 (1963) 15

Hamilton v. *Regents of Univ. of Cal.*, 293 U.S. 245 (1934) 2
Hornsby v. *Allen*, 326 F.2d 605 (5th Cir. 1964) 22, 24

Jordan v. *American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1948) 22

Katzenbach v. *McClung*, 379 U.S. 294 (1964) 15

Lathrop v. *Donohue*, 367 U.S. 820 (1961) 2, 16
Live Oak Water Users' Ass'n v. *Railroad Comm'n*, 269 U.S. 354 (1926) 2

Morgan v. *United States*, 298 U.S. 468 (1936) 22

New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63 (1928) 21

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U.S. 287 (1920) 22

Parker v. *Brown*, 317 U.S. 341 (1943) 25, 26

Page

St. Helena Parish School Bd. v. *Hall*, 368 U.S. 515 (1962), *affirming* 197 F.Supp. 649 (E.D. La. 1961) .. 23
St. Louis, I.M. & So. Ry. v. *Starbird*, 243 U.S. 592 (1917) 21
Sangamon Valley Television Corp. v. *United States*, 358 U.S. 49 (1958) 23
Sangamon Valley Television Corp. v. *United States*, 269 F.2d 221 (D.C. Cir. 1959) 22, 24
Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 15
Sid Westheimer Co. v. *Piner*, 263 S.W. 578 (Tex. Comm'n App. 1924) 13
Southwestern Bell Telephone Co. v. *Texas State Optical Co.*, 253 S.W.2d 877 (Tex. Ct. Civ. App. 1952) .. 6

Texas State Bd. v. *Carp*, 412 S.W.2d 307 (Tex. Sup. Ct. 1967) 1, 6, 13
Texas State Bd. v. *Carp*, 388 S.W.2d 409 (Tex. Sup. Ct. 1965) 2, 11, 21
Tot v. *United States*, 319 U.S. 463 (1943) 18, 19
Truax v. *Raich*, 239 U.S. 33 (1915) 15

United States v. *Constantine*, 296 U.S. 287 (1935) 23
United States v. *Romano*, 382 U.S. 186 (1965) 18

Washington ex rel. Seattle Title Trust Co. v. *Roberge*, 278 U.S. 116 (1928) 15, 16
Western & A.R.R. v. *Henderson*, 279 U.S. 639 (1929) .. 18, 19

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 24

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

Bituminous Coal Conservation Act of 1935, 49 Stat. 991 (1935) 14

Federal Firearms Act, 52 Stat. 1250 (1938) 19

15 U.S.C. §§ 1, 2 (1964) 3, 21, 24, 25

Page

28 U.S.C. § 1257(2) (1964) 2

28 U.S.C. § 2103 (1964) 2

U. S. Constitution, Article VI 3

U. S. Constitution, Amendment V 4, 14, 21, 24

U. S. Constitution, Amendment XIV, Section 1 ..... 3, 4, 15, 20, 21, 22

Texas Revised Civil Statutes, Article 4554 6

Texas Revised Civil Statutes, Article 4556 ..... 3, 6

Texas Revised Civil Statutes, Article 4563(b) 10

Texas Revised Civil Statutes, Article 4565g 10

Texas State Board of Examiners in Optometry Resolution and Rules:

Advisory Committee Resolution, June 30, 1957 ..... 3, 7

Basic Competence Rule 10

Professional Responsibility Rule, Dec. 21, 1959 ..... *passim*

Rule Making Procedure Rule, July 1, 1957 ..... *passim*

MISCELLANEOUS:

1 Davis, Administrative Law §§ 7.02-.03 (1958) 22

4 Tex. Jur.2d 234, § 740 (1959) 13

In the

Supreme Court of the United States

October Term, 1967

No. .....

Ellis Carp, *et al.*,

Appellants,

—v.—

Texas State Board of Examiners in Optometry, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

Appellants, Dr. Ellis Carp, Dr. S. J. Rogers, and Dr. N. J. Rogers, appeal from a final judgment of the Supreme Court of the State of Texas and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Texas in the decision appealed from is reported at 412 S.W.2d 307 (1967), together with the dissenting opinion in that case; both opinions are reprinted in Appendix A to this Statement, p. 1a, *infra*. The opinion of the Court of Civil Appeals of Texas is reported at 401 S.W.2d 639 (1966), and is reprinted in Appendix A, p. 27a, *infra*.

The opinion of the Supreme Court of Texas in a case related to the decision here appealed from—involving a

request by the Texas State Board of Examiners in Optometry and others for a writ of mandamus directed to the trial court in the present case—is reported at 388 S.W.2d 409 (1965), along with the dissenting opinion. These opinions are reprinted in Appendix A, p. 39a, *infra*.

JURISDICTION

This suit was brought to secure a judgment declaring invalid a rule adopted by the Texas State Board of Examiners in Optometry. The judgment of the Supreme Court of Texas was entered on February 8, 1967, and a timely motion for rehearing was denied on March 29, 1967*; notice of appeal to the Supreme Court of the United States was filed in the Texas Supreme Court on June 13, 1967.

The jurisdiction of this Court to review the decision by direct appeal is invoked under 28 U.S.C. § 1257(2) (1964); the rule here in question is clearly legislative in nature, and hence is to be treated as a "statute of [a] state" for purposes of that section.** Should the Court determine that the constitutional issues presented herein are not properly appealable, they should be considered as if contained in a petition for certiorari. 28 U.S.C. § 2103 (1964).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The regulation here challenged as invalid is the Professional Responsibility Rule adopted on December 21, 1959,

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* See App. B, pp. 63a-64a, *infra*.

** See, *e.g.*, *Lathrop* v. *Donohue*, 367 U.S. 820 (1961); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934); *Live Oak Water Users' Ass'n* v. *Railroad Comm'n*, 269 U.S. 354 (1926).

by the Texas State Board of Examiners in Optometry. Two other regulations of that Board, both adopted at a meeting convened on June 30, 1957, are involved: first, a resolution establishing an Advisory Committee of optometrists; and second, a Rule Making Procedure Rule. The Board's authority to enact rules governing the practice of optometry stems from Article 4556, Texas Revised Civil Statutes.* The full texts of the state regulations involved and the underlying statute are set out in Appendix C, p. 65a, *infra*.

The validity of the Professional Responsibility Rule is challenged on the basis of the due process clause of the fourteenth amendment, U.S. Const. amend. XIV, § 1, the supremacy clause, U.S. Const. art. VI, and the Sherman Act, sections 1 and 2, 15 U.S.C. §§ 1, 2 (1964).

QUESTIONS PRESENTED

1. When a profession within a state is divided into two competing groups with conflicting economic interests, one of which comprises a large majority of the profession, is it consistent with due process of law for the minority group's business to be destroyed by means of a rule drafted by an unofficial body of private practitioners, where no official authority of the state exercises its judgment as to the rule's desirability, but instead the rule is adopted simply on the basis of an approval in an election by a specified majority of the profession?

2. Where a profession is thus split into majority and minority factions with conflicting economic interests, is it reasonable and consistent with due process of law for a state regulatory board to adopt a rule destroying the

* All statutory references, unless otherwise noted, are to Texas Revised Civil Statutes (Tex. Rev. Civ. Stat.).

business of the minority group solely on the basis of a presumption that any proposed regulation favored by two-thirds of the profession's members is reasonable and in the public interest?

3. Can an administrative rule prohibiting the type of practice engaged in by a minority group within a regulated profession and affecting interstate commerce be held valid under the due process and supremacy clauses despite the fact that the members of the administrative agency who voted to adopt the rule were acting pursuant to a conspiracy with the majority faction of the profession to destroy the business of the minority?

STATEMENT OF THE CASE

This case arises out of the competition that has long existed in Texas between "multiple-office" and "independent" practitioners of optometry. For many years the latter faction, comprising a substantial majority of the profession, has attempted by various means to put the Appellants —who maintain the largest and most significant multiple-office practices in the state—out of business. The Professional Responsibility Rule here at issue represents the culmination of that campaign. This Statement will show that the Rule was adopted without the exercise of any official judgment that its provisions would benefit the people of Texas, but that effective responsibility for its enactment was instead delegated to and exercised solely by the private optometrists of the state. The majority of independent practitioners were free to impose whatever restraints they chose upon their less numerous multiple-office competitors. In these circumstances it is hardly surprising that the result of the Rule's application will be the total destruction of Appellants' multiple-office practice.

1. ***Optometry Practice in Texas***

The majority faction of Texas optometrists, practicing independently in individual offices, has long had economic interests in conflict with those of practitioners who engage in multiple-office practice. Under the latter method of practice, numerous offices throughout the state are owned and managed by a single optometrist or group of optometrists, and other licensed practitioners are employed to staff the various offices thus maintained. At each such office customers may receive optical examinations conducted by the licensed optometrist in charge and may obtain prescribed spectacles. This method of practice makes possible substantial cost savings, and the competition thus created serves to keep prices significantly below those which prevail in areas where multiple-office practice does not exist. S.F. 162-64.*

Appellants are licensed optometrists who maintain the most substantial multiple-office practices in Texas. Drs. S. J. and N. J. Rogers have operated their business under the trade name "Texas State Optical" since 1939 and at the time of trial maintained 82 offices in numerous locations throughout the state. Dr. Carp has been in business since 1939 and operated at the time of trial 71 offices under several trade names. The Appellants have invested large sums in leases, equipment, and the development of good will and have competed vigorously with each other and with other optometrists in the state. S.F. 31-33, 43-52, 162-64, 1595-1608, 3233.

Because of such efforts on the part of Appellants and because of the cost advantages of their method of practice,

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* References to "S.F." are to specific pages of the "Statement of Facts"—the court reporter's transcript of the evidence introduced in the trial court.

the independent practitioners, through their professional organization—the Texas Optometric Association (TOA), have over the years repeatedly attempted to eliminate the competition generated by that method of practice. An effort was made in 1939, for example, to secure legislation which would prohibit the use of trade or assumed names; these proposals were rejected, however, by the Texas legislature. Appendix A, p. 13a; 412 S.W.2d at 313. Since that time, the TOA has periodically engaged in comparable activity with similar aims.*

2. *Adoption of the Professional Responsibility Rule*

The Texas legislation concerning optometry regulation, insofar as it is pertinent here, has remained unchanged since 1939. It establishes the Texas State Board of Examiners in Optometry, all of the members of which must be practicing optometrists, Tex. Rev. Civ. Stat. art. 4554, and authorizes the Board to make regulations, "not inconsistent" with the statutory scheme as a whole, concerning the practice of optometry. Tex. Rev. Civ. Stat. art. 4556. At all pertinent times, five of the six members of the Board were independent practitioners and members of the TOA. Tr. 8;** S.F. 70-71.

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* In 1951, for instance, the TOA appeared as *amicus curiae* in a suit involving Appellants Rogers and the Southwestern Bell Telephone Company, in order to argue that Texas State Optical was not entitled to be listed in the classified directory under the title "Optometrists." See *Southwestern Bell Telephone Co.* v. *Texas State Optical Co.*, 253 S.W.2d 877 (Tex. Ct. Civ. App. 1952). See also the opinion of the Court of Civil Appeals, App. A, p. 33a, 401 S.W.2d at 643; S.F. 85-93. And shortly after the contentions thus advanced were rejected by the state court, further efforts—likewise unsuccessful—were made by independent practitioners to secure legislation prohibiting trade name practice. Opinion of the Court of Civil Appeals, App. A, p. 33a, 401 S.W.2d at 643; S.F. 128-35.

** References to "Tr." are to specific pages in the clerk's transcript of the proceedings in the trial court, including motions, pleadings, stipulations, etc.)

At one meeting in 1957 the Board took two steps which laid the foundation for adoption of the Rule challenged here. S.F. 2837.

First, without specific legislative authorization, the Board set up an Advisory Committee of individual optometrists, consisting of one optometrist from each of the state's legislative districts, each to be appointed by the state legislator representing the district in question. Appendix C, p. 72a. No provision of Texas law required that the members of the Committee, most of whom were independent practitioners, take an oath of office; nor was any compensation provided for. At no place in the record is it suggested that an oath was administered to the Committee or that its members were compensated by the state in any way.

Second, the Board of Examiners at the same meeting adopted, also without specific legislative authorization, a Rule Making Procedure Rule, which provided that any proposed rule approved by a two-thirds vote in which a majority of the state's optometrists participated would be considered by the Board to be "prima facie" reasonable and in the public interest. This Rule further prohibited the adoption by the Board of any rule that did not receive such approval and provided that rules proposed by twenty-five percent of the optometrists of the state would automatically be submitted to a vote of the optometrists. Appendix C, p. 71a.

The Advisory Committee proceeded to hold a meeting, at which it voted to recommend to the Board adoption of the Professional Responsibility Rule in substantially the form set out in the Appendix C, p. 66a, and challenged here. S.F. 2800. Various provisions of the Rule prohibited practices designated as "fee splitting" and "assumed name prac-

tice," and the Rule as a whole was plainly and effectively designed to accomplish its admitted objective—the outlawing of Appellants' multiple-office practices. The record contains no suggestion that a hearing or investigation of any sort was conducted by the Committee, and no rationale for the adoption of the Rule, or explanation of how it would serve the public interest, was offered.

The President of the Board, following the Rule Making Procedure Rule, automatically submitted the proposed Professional Responsibility Rule to a vote of the state's practicing optometrists; he informed the Board at its next meeting that the Rule had been so submitted "as set forth in the board's rules of procedure." S.F. 2809. No specific decision had been made by the Board to put the Rule to a vote. Nor had any consideration been given to the reasonableness of or need for the Rule.*

The proposed Rule was, not surprisingly, approved by the signed ballots of well over two-thirds of the optometrists expressing an opinion.** The Board then, admittedly acting in accordance with its Rule Making Procedure

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*In 1954 there had been some deliberation concerning a proposed regulation with provisions similar in certain respects to those of the Professional Responsibility Rule here in question. This deliberation cannot be asserted to justify the Board's action on the Professional Responsibility Rule. The 1954 proposal was repealed after adoption when the Attorney General of Texas advised against its constitutionality. S.F. 307-09. Even apart from the lapse of five years and the fact that the Professional Responsibility Rule was an entirely separate regulation originating independently of any past proposals, the Board never purported to act on the basis of its earlier deliberations. It polled the state's optometrists, not on the basis of any decision as to the merits of the 1959 Rule, but rather automatically under the terms of its Rule Making Procedure Rule. S.F. 2809; Tr. 111.

**Of the 578 optometrists voting (slightly less than two-thirds of the profession), 542 favored the Rule. S.F. 2843.

Rule,* proceeded to adopt the Rule as approved. During the meeting at which the Rule was enacted, on December 21, 1959, the Board once again neither presented nor heard any evidence designed to show that the Rule's provisions were necessary or even reasonable.** S.F. 814-16. Adoption of the Rule was based on nothing more than the presumption of reasonableness derived from the optometrists' approval of its terms.

3. *What the Rule Does*

What the Rule does and does not accomplish should be kept clear. Its provisions are not designed to deal specifically with the various undesirable practices which Appellees have suggested throughout this litigation in attempts to give the Rule a hue of reasonableness. Rather, the Rule outlaws only the general structure of Appellants' practice, in which trade names and multiple offices are utilized, regardless of the character of the optometrists involved or the propriety of their professional conduct.***

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* Appellees have so stipulated. Tr. 111.

** The Board did allow Appellants to appear before it and argue that the Rule should not be adopted. See note, p. 17, *infra*.

*** Specifically, the Rule forbids an optometrist from dividing fees for optometric services with another optometrist "except upon a division of service or responsibility." App. C, p. 67a. It further prohibits an optometrist from using in connection with his practice, a name other than his own. Also, it forbids an optometrist from allowing the use of his name on any sign in an optometry office "unless said optometrist is actually present and practicing optometry therein during the hours such office . . . is open to the public for the practice of optometry." App. C, p. 68a. Similarly, an optometrist may not practice in an office with a sign bearing another's name indicating that the office is "owned, operated, supervised, staffed, directed or attended" by the other if the other is not actually present. The Rule defines "actually present" as being physically present for half the number of hours the office is open during each month for at least nine months each year or as

Some of the practices to which the Appellees have pointed in attempting to justify the Rule are clearly insufficient for this purpose: if the practices had in fact been engaged in, the Board would have had ample authority under both statutory prohibitions of fraudulent practices, Tex. Rev. Civ. Stat. arts. 4563(b), 4565g, and the Board's own "Basic Competence" Rule, S.F. 2731, to take direct action against the individuals involved. Significantly, however, no such action has been taken. Conduct not already prohibited on the other hand, could easily be made the target of further specific regulations.

With regard to practices already prohibited, the Professional Responsibility Rule is of course unnecessary. With respect to practices not previously prohibited, the Rule's approach is interestingly discriminatory: optometrists practicing individually are still perfectly free to engage in such practices, while the Appellants' entire method of practice is prohibited wholesale, without regard to whether any of the undesirable acts are committed. Thus, Appellees' allusions to such specific undesirable practices as justifications for the Rule can hardly be persuasive.

4. *History of These Proceedings*

Faced with the destruction of their businesses, Appellants sought a judgment in the 101st District Court of Dallas County, Texas, declaring invalid the Professional Responsibility Rule.* The federal questions, concerning which re-

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being physically present at least half the time the person conducts any practice of optometry.

Obviously, the Rule will have a specific effect on those using trade names and having more than two offices, i.e., multiple-office practitioners such as Appellants.

*At the time the Rule was adopted there was pending in the state court referred to above a suit to which the Board and the

view by this Court is sought, were raised and argued before the trial court in timely fashion, having been first presented in the Appellants' First Amended Original Petition. Tr. 8-10, 13-14, 20-21, 21-26, 27-28.

After submitting numerous questions to the jury, on none of which the members of the jury were able to agree, the trial judge on May 24, 1964, declared a mistrial. The Board then sought a writ of mandamus in the Supreme Court of Texas, asking that the trial judge be compelled to set aside his order declaring a mistrial and to enter a final judgment determining the validity of the Rule. The Texas Supreme Court, one justice dissenting, granted the writ as prayed for, holding that the issues in question—concerning the authority of the Board and the validity of the Rule—were questions of law for the trial judge to determine. That court further held that Appellants' allegations of a conspiracy in restraint of trade among the optometrists of the state and the members of the Board, with the purpose of putting Appellants out of business, were insufficient as a matter of law to affect the validity of the Rule, so that questions relating to those allegations were not to be determined by the trial court. Appendix A, pp. 45a-52a; 388 S.W.2d at 413-17. Rehearing, sought in timely fashion by Appellants, was denied on April 7, 1965.

The trial court then proceeded to judgment, sustaining the Rule against all statutory and constitutional challenges not disposed of by the state supreme court. Tr. 151-59. This decision was appealed to the Texas Court of Civil Appeals for the Fifth Supreme Judicial District of the

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Appellants were parties. On December 22, 1959, Appellant Carp filed an amended petition challenging the validity of the Rule. The action was restyled *Ellis Carp, et al.* v. *Texas State Board of Examiners, et al.*, and Appellants Rogers became co-plaintiffs, also challenging the validity of the Rule.

state, where the remaining constitutional issues urged herein were properly raised and argued. (Brief for Appellants in the Court of Civil Appeals, pp. 72-94.) In a decision rendered March 25, 1966, the Court of Civil Appeals reversed the trial court's decision, finding that in adopting the Professional Responsibility Rule the Board had exceeded the powers statutorily delegated to it. Appendix A, p. 27a; 401 S.W.2d 639. That court also undertook to pass upon Appellants' constitutional claims, asserting most of them to be unmeritorious. Appendix A, pp. 37a-38a; 401 S.W.2d at 644-45. Appellants' motion for rehearing urged all points which had not been sustained by the court; on April 15, 1966, that motion was denied.

A writ of error was then sought by Appellees from the Supreme Court of Texas. Under a procedure authorized by Texas law, the Appellants also applied to that court for a conditional writ of error, allowing consideration of their constitutional arguments in the event that Appellees' request for review was granted. Those federal questions here in issue that had been before the Court of Civil Appeals were properly raised by this conditional application. The application has, however, never been passed upon by the Texas Supreme Court in any manner whatsoever—despite the fact that Appellees were granted the writ of error they sought.

During the proceedings on Appellees' writ of error, the Texas Supreme Court thus had full notice of the presence in this case of every federal question now argued—with the exception, of course, of those which that court had disposed of in the earlier mandamus action. The issues were briefed at considerable length in the conditional application for writ of error. Appellants' decision not to brief certain of the issues still further as "cross-points"

in the state supreme court is therefore irrelevant to the preservation of those issues. The mere failure to brief for a second time a point which had clearly and fully been brought to the attention of that court can in no way be deemed a waiver of the point.* Appellants thus have done all that is necessary to preserve throughout this litigation the federal constitutional questions now presented to this Court.

The Texas Supreme Court reversed the judgment of the Court of Civil Appeals, holding that the Rule was within the statutory powers of the Board of Examiners and that the Rule was supported by substantial evidence. One justice dissented from this judgment. Appendix A, p. 15a; 412 S.W.2d 307. Appellants' motion for rehearing by the Supreme Court of Texas was denied on March 29, 1967. Appendix B, p. 64a.

THE QUESTIONS ARE SUBSTANTIAL

For the following reasons, Appellants contend that the questions presented are substantial and that plenary consideration by this Court, with briefs on the merits and oral argument, is required for their resolution.

I. THE RULE, BECAUSE OF THE PROCEDURES BY WHICH IT WAS ADOPTED, DEPRIVES THE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The crucial fact upon which the unconstitutionality of the Professional Responsibility Rule rests is that it originated with, was drafted by, and was established by private

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* Under Texas law, in fact, failure to press a constitutional question at a particular stage of litigation does not effect a waiver. See 4 Tex. Jur. 2d 234, § 740 (1959); *Sid Westheimer Co.* v. *Piner*, 263 S.W. 578 (Tex. Comm'n App. 1924).

members of the optometry profession in Texas, rather than by any state body or agency officially concerned with the public interest. The members of this private group—individuals with a clear economic self-interest and a demonstrated, organized hostility to optometrists competing with them through multiple-office practice—found themselves free to impose their will on their competitors and to drive them out of business. The wisdom, necessity, and reasonableness of the Rule by which these ends were accomplished, and through the operation of which Appellants stand to lose huge sums invested in their businesses, were neither apparent nor explained; and, most significantly, they were never passed upon by any official state authority.

A. The Rule Was Adopted by Economically Interested Private Persons and Without Any Act of Judgment by Officials Concerned With the Public Interest.

This Court made it clear in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), that it is inconsistent with due process of law for some of the members of a business or profession, not required to exercise their judgment in the public interest, to be clothed with authority to impose their will on the remainder of that business or profession. In *Carter Coal*, certain provisions of the Bituminous Coal Conservation Act of 1935 were declared inconsistent with the due process clause of the fifth amendment. These provisions in effect made mandatory, for all members of the coal industry, whatever wage and hour agreements might be entered into by producers of a specified proportion of the nation's (or a particular area's) coal and a majority of employees in the area in question. "[O]ne person," the Court emphasized, "may not be entrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311.

The principle thus enunciated is plainly sound. Such power would give the force of law to decisions motivated solely by private gain, regardless of public policy and in violation of the standards of government guaranteed by the fourteenth amendment's due process clause. This conclusion has special force when an interest as vital as the right to engage in a profession is at stake.*

The principle expressed in *Carter Coal* cannot be limited to matters involving the distribution of power within the federal government; its foundation of fairness is far too fundamental. In *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), and *Eubank* v. *Richmond*, 226 U.S. 137 (1912),** —in the context of real estate zoning restrictions the operation of which was left to the discretion of private individuals—this Court specifically found the principle embodied in the guarantees of the fourteenth amendment.*** Indeed, there is a sound basis for main-

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* *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Truax* v. *Raich*, 239 U.S. 33 (1915).

** Criticism which may be directed at the *Carter*, *Roberge*, and *Eubank* cases should be carefully weighed. Certain aspects of those decisions may, it is true, be regarded skeptically. The Court's approach to the interstate commerce question in *Carter*, for instance, cannot be reconciled with more recent opinions. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). And wider latitude generally has been given to zoning regulations since the time of *Roberge* and *Eubank*. But it would be unjustified to extend such criticisms beyond their legitimate sphere to condemn the principle upon which Appellants here rely. That principle—which is at the heart of all three cases—must be regarded as sound and has been neither overruled nor outdated. Decisions during the past thirty years sustaining certain kinds of legislative delegation of authority to administrative agencies are plainly not in point; it is, in fact, the *lack* of any such official, administrative authority in the promulgation of the Professional Responsibility Rule which the Appellants here attack.

*** For a recent state court decision resting on a similar foundation, see, *e.g.*, *Group Health Ins.* v. *Howell*, 40 N.J. 436, 193 A.2d 103 (1963).

taining that the very notion of law involves the idea of government pursuant to official decision—that is, decision by some duly constituted authority, duty-bound to act with a view to the public good rather than in furtherance of individual interests.

The principle upon which the *Roberge* and *Eubank* decisions rest applies even more forcefully in the circumstances of the present case. The authority exercised by the private individuals involved in *Roberge* represented only the power to veto the building of a nursing home; and in *Eubank*, the power was only that of determining whether or not a building line should be established: the precise location of the line was determined by public authorities. Here, on the other hand, the drafting of the Professional Responsibility Rule was committed to private hands, and the Rule was adopted exactly as approved by the optometrists' vote. The Board of Examiners never exercised its judgment on whether the Rule was in the public interest. Every policy decision, in short, was made by private persons rather than by any official state authority.

Legally effective regulation of businesses and professions may of course be achieved in a variety of ways—by means of direct legislation, commissions, and agencies of many types. And participation in the regulatory process by private members of the regulated business or profession is often entirely permissible and quite useful. See, *e.g.*, *Lathrop* v. *Donohue*, 367 U.S. 820 (1961). However, some procedures must exist which ensure that (1) at least a minimal degree of consideration is given to the need for the regulation in question and to its effect on relevant public and private interests and (2) control over adoption of the rule is exercised at some point by persons with official standing who are clearly responsible for acting in

accordance with the public welfare rather than in furtherance of personal or private interests.

In the present case such safeguards are absent, and the dangers against which they are designed to operate are vividly illustrated. No decision concerning the wisdom or reasonableness of the Rule was made by the Board at any time. Instead, that agency relied entirely upon the "automatic referral" and "presumption of reasonableness" provisions of its Rule Making Procedure Rule. Thus, the Board adopted the regulation, proposed by the unofficial Advisory Committee, simply because the regulation received the approval of two-thirds of the optometrists voicing an opinion; the Board's action was no more than an echo of the self-indulgent preferences expressed by the profession's majority faction.*

No state official or body ever made or even pretended to make any determination that the Rule was in the public interest. Nor did any state authority ever set standards limiting the absolute discretion of the profession in passing on the Rule. (It would have been naive, of course, to expect adherence to any such standard.) Rather, it is clear that the optometrists were completely free to vote in accordance with their personal and economic interests—which were amply demonstrated in organized fashion by the long-time efforts of the TOA to abolish multiple-office practice.

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* The Board did hold a hearing concerning the Rule at which Appellants were allowed to argue that the Rule should not be adopted. However, a hearing at which adoption of the Rule was assured unless its opponents could carry the unprecedented burden thrust upon them of somehow overcoming the presumption of reasonableness and necessity—and at which absolutely no evidence as to the Rule's desirability was presented—surely cannot suffice to make the Board's deference to the state's optometrists anything less than an abdication of its responsibility.

The Rule, in sum, represents merely the predictable desires of a majority faction of the optometrists in Texas.

The vices of the procedures utilized in this case point up the clear distinction between such procedures and more traditional elective methods of legislation, approved and used by several states, such as referendum and initiative. Where the entire electorate passes upon a particular issue, cross-section opinions from every area of society are expressed; and the result is an expression of the public interest. In the present case, only parties with direct economic interests were involved in the decision-making, and their views were never tempered by the views of the electorate as a whole. The power of the independent optometrists was essentially absolute.

The extreme circumstances of the present case call for this Court again to make it clear that due process of law sets limits to private government and that it requires responsible, official decisions to be made concerning matters of such consequence as the right to engage in a business or profession and the degree of competition to be allowed therein.

B. Adoption of the Rule Was Premised on an Unreasonable Presumption.

The presumption created by the Board's Rule Making Procedure Rule—that any proposed rule approved by two-thirds of the state's optometrists who cared to express an opinion is reasonable and in the public interest—is clearly irrational, and therefore the Professional Responsibility Rule should be held invalid under the principle of cases such as *United States* v. *Romano*, 382 U.S. 186 (1965), *Tot* v. *United States*, 319 U.S. 463 (1943), and *Western & A.R.R.* v. *Henderson*, 279 U.S. 639 (1929).

In *Tot*, this Court was presented with a conviction under the Federal Firearms Act, which provided that possession of firearms by certain classes of persons would be "presumptive evidence" that such firearms were "shipped or transported or received" in interstate commerce—a jurisdictional requirement for the statute's application. Finding "no rational connection between the fact proved and the ultimate fact presumed," the Court held the conviction invalid. The Court stated,

> "[W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." * 319 U.S. at 468.

In the *Henderson* case, this principle was applied to the states. The fact of a collision between a train and another vehicle at a highway grade crossing was deemed by a state statute to raise a presumption of negligence on the

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* The principle of cases such as *Tot* and *Henderson* cannot be limited to situations in which the presumption involved is a rule of evidence, applicable to the conduct of litigation. No persuasive reason to impose such a restriction is apparent. The evil of irrationality seems, if anything, more serious when an agency institutes a presumption that any and all suggestions of a particular private group are worthy of being enacted into law; for the undesirable effect of the presumption in such a case—located as it is at the very center of the legislative process, affecting a large number of cases within a general class—is greatly amplified.

This is not to suggest, of course, that the actual reasoning processes of a legislature or an agency are to be judicially scrutinized under a standard of rationality with respect to every enactment. There is a clear distinction between the ordinary situation in which such an authority affirmatively considers and promulgates a rule of law—as to which no such scrutiny is called for—and that involved in the present case, in which the Board of Examiners abdicated that legislative responsibility by means of the presumption in question.

part of the railroad involved; rational connection was again found wanting, and the provision was held invalid on fourteenth amendment grounds.

Here, the preferences of a majority of the state's optometrists were surely more likely to be determined by self-interest than by notions of the public good. The members of the TOA were presented with a golden opportunity; they could, by means of a simple "yes" vote, rid the state of competitors who were able consistently to offer services at more attractive rates than those of higher-cost independent practitioners. And conveniently, they were bound by no oath and had not undertaken the task of working exclusively in the public interest. It would scarcely be unlikely in such circumstances for balanced judgment—including consideration, for example, of the fact that the abolition of multiple-office practice would almost certainly raise the cost of eye care to Texas residents, S.F. 162-64—to be overcome by the force of self-interest. Thus, the majority's preferences cannot be said to bear a rational connection with the conclusion that the Rule approved by them is reasonable and in the public interest.

II. THE RULE IS VOID BECAUSE IT WAS ADOPTED PURSUANT TO A CONSPIRACY TO PUT THE APPELLANTS OUT OF BUSINESS.

In the trial court, Appellants alleged that the Board members who promulgated the Professional Responsibility Rule did so not on the basis of considerations concerning the public welfare, but instead in furtherance of a conspiracy with a majority of the state's optometrists to put the Appellants out of business and thus to promote their own private interests. Tr. 9-10, 27-28; S.F. 142-44. A demonstration of the truth of these allegations would, Appellants contend, establish that the Rule denies them due process of law and

that it is invalid under the supremacy clause as a violation of the Sherman Act. Thus, the Texas Supreme Court's holding that the allegations were irrelevant to the Rule's validity* was in error. Furthermore, regardless of whether the Board members themselves participated in the conspiracy referred to, the Rule would be rendered void as a violation of the federal antitrust laws by virtue of the dominant role played by the conspiring optometrists in its creation and promulgation and the lack of any official decision concerning the wisdom of the Rule.**

A. The Participation of the Board Members in the Conspiracy Denied Appellants Due Process of Law.

It would be difficult to conceive of a more serious deprivation of fourteenth amendment guarantees than that which occurs when administrative officials act on the basis of selfish motives rather than an evenhanded consideration of the public good. The protection of individual rights which is embodied in the procedural requirements of due process

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* In its interlocutory mandamus decision (App. A, pp. 45a-52a; 388 S.W.2d at 413-17 (1965)) the Texas Supreme Court held that, even if the allegations were true, the facts thereby established would not affect the validity of the Rule; and that court refused accordingly to allow the trial judge to make a decision concerning them.

** Under modern concepts of pleading, the allegations of conspiracy were sufficient to raise the federal questions suggested above. It is clear that a conspiracy or agreement among optometrists to eliminate competitors, with its obvious effect on interstate commerce in optical supplies and equipment, would constitute a violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1964). As this court stated in *St. Louis, I.M. & So. Ry.* v. *Starbird*, 243 U.S. 592, 598 (1917), "the Judicial Code does not require that the statute creating the federal right shall be especially set up. The courts take judicial notice of the statute." See generally *Braniff Airways* v. *Nebraska State Bd.*, 347 U.S. 590, 598-99 (1954); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). Moreover, Appellants have consistently argued at every stage of this litigation that they were denied due proces of law.

is rendered meaningless when corruption or self-interest controls the administrative process—as is alleged here by Appellants.

Judicial inquiry into alleged administrative corruption is neither unusual nor difficult. In *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964), an unsuccessful applicant for a liquor license alleged that she had been denied the license, not because she did not meet legitimate requirements or qualifications, but rather because, *inter alia*, she was not "approved" by the aldermen representing the ward in which her store was to be located, as required by an unwritten "ward courtesy" system. The allegations were held by the Fifth Circuit to set out violations of the applicant's fourteenth amendment rights to due process and equal protection of the laws.*

Similarly, bribery would surely call for invalidation of any decisions made as a result of such improper influence. In *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 224 (D.C. Cir. 1959), the District of Columbia Circuit held that "private approaches" to members of the

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* *Accord*, *Glicker* v. *Michigan Liquor Control Comm'n*, 160 F.2d 96 (6th Cir. 1947) (equal protection).

The fact that the present case involves adoption of a rule rather than denial of a license should not render inapplicable the principle thus expressed. For the Professional Responsibility Rule was clearly designed, from start to finish, to apply specifically to Appellants, whose operations have for years constituted the most significant multiple-office optometry practices in Texas. Due process deals with realities, not conceptual categories. And when the design and effect of administrative action is so clearly focused upon a few individuals, as is the case here, the requirements of the fourteenth amendment afford such individuals protection, just as in cases such as *Hornsby*. *Cf.* 1 Davis, Administrative Law §§ 7.02-.03 (1958). *Compare Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 289 (1920), *with Morgan* v. *United States*, 298 U.S. 468, 480 (1936), *and Jordan* v. *American Eagle Fire Ins. Co.*, 169 F.2d 281, 285, 287-88 (D.C. Cir. 1948).

Federal Communications Commission "vitiated its action" in assigning certain television channels—despite the fact that the assignment was regarded as rule-making activity. See *Sangamon Valley Television Corp.* v. *United States*, 358 U.S. 49-50 (1958) (per curiam).

The doctrine of *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810), does not bar the result here suggested. That doctrine purports to apply only to—and is properly viewed as limited to—situations in which *legislatures*, either state or federal, are involved. In such situations an attitude of deference to one of the major governmental organs in our political system—holding valid regardless of that body's motives any legislation duly enacted in accordance with prescribed procedures—may be appropriate.* But such deference need not and should not extend to administrative agencies. Innumerable such bodies exist throughout this country, many of which act to a large extent outside the public eye because of either the technical nature or the obscurity of their functions. Shielding the members of each such agency from the sort of scrutiny Appellants here seek could have the effect of validating, unnecessarily and unwisely, many clearly discriminatory actions.

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* This Court's recent decision in *Griffin* v. *School Bd.*, 377 U.S. 218 (1964), makes it plain that even in the case of a state legislature, the motives behind certain enactments can be so clear and so plainly impermissible that they will be judicially recognized and passed upon. In that case, the Court was able to find that the public schools of Prince Edward County, Virginia, "were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school." And, accordingly, the statutory scheme of private education there involved was held unconstitutional. 377 U.S. at 231. See *St. Helena Parish School Bd.* v. *Hall*, 368 U.S. 515 (1962) (per curiam), *affirming* 197 F. Supp. 649 (E.D. La. 1961) (per curiam) (three-judge court); *United States* v. *Constantine*, 296 U.S. 287 (1935).

The consequences of permitting such scrutiny, on the other hand, would be no more dire than those which attend holdings such as *Hornsby*, in the field of licensing. Allegations of misconduct or discrimination must, after all, be proved in order for litigants challenging such action to succeed. And the chances of disruption because of threatened litigation are at least as great in areas such as licensing, where decisions almost always concern individuals intimately, as in rule-making situations similar to that involved here.

The judiciary is often forced to inquire into the motives of individuals. There is no reason to believe that it would be more difficult to determine whether a Board member participated in a conspiracy in restraint of trade than to determine whether the president of a large corporation did so.* The burden put upon one seeking to prove motives such as those here attributed to the independently practicing Board members may properly be a heavy one. Appellants seek only the opportunity to meet that burden.

B. The Conspiracy Renders the Rule Invalid Under the Supremacy Clause as a Violation of the Sherman Act.

Appellants' allegations that the Rule was adopted pursuant to a conspiracy to put them out of business are relevant in still another respect: if the allegations should be found to be correct, the Rule would represent an essential

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* The possible argument that Appellants' contentions would involve the judiciary in an impossibly difficult task—determining the motives of agency officials—is belied not only by *Hornsby* and *Sangamon Valley*, but also by the line of cases beginning with *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). *Yick Wo* established that discriminatory enforcement of a statute fair on its face constitutes a denial of equal protection; the motives of police and other government officials have thus been subject to judicial scrutiny for eighty years without any serious difficulties plaguing the courts.

part of a naked conspiracy to eliminate competitors and—with its clear impact on interstate commerce in optical equipment and supplies—would be invalid under the supremacy clause as a violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964).*

The character of the Rule as an obvious restraint of trade inconsistent with federal law could be disputed only on the ground that it is immunized from application of the Sherman Act by virtue of the involvement of the State of Texas in its adoption. But no such immunization is proper; the only cases suggesting the applicability of such an immunity contemplate state action of quite a different sort than that involved here.

Parker v. *Brown*, 317 U.S. 341 (1943), and *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), have held that the Sherman Act was not intended to forbid all state action with anticompetitive effects. The state schemes upheld in those decisions, however, were programs concededly enacted by official state authorities and designed to serve the public interest.

In *Parker*, adoption of the agricultural regulations challenged on Sherman Act grounds was regarded simply as "an act of government"; no allegations that the regulations were the result solely of an anticompetitive conspiracy were made.** And the *Noerr* case involved a situation in

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* See, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Fashion Originators' Guild of America* v. *FTC*, 312 U.S. 457 (1941).

** It was argued in the *Parker* case that there had been an undue delegation of legislative authority to members of the group regulated. In rejecting this argument and holding that state participation in the program's enactment immunized it from the Sherman Act, however, this Court repeatedly stressed that—just as in *Noerr*—an admittedly official state body had determined that the rule was in the public interest. See 317 U.S. at 352.

which a disinterested, official state authority—the state legislature—clearly made a policy decision that the statute in question would further the public good; it was not contended that the legislators voting in favor of the statute acted out of motives inconsistent with that goal.

Here, on the other hand, it is alleged that the members of the Board who voted to adopt the Professional Responsibility Rule did so specifically and solely in order to achieve the privately beneficial, anticompetitive aim of putting the Appellants out of business. They made no decision that the Rule would be in the public interest. *The very persons who produced the Rule were themselves a part of the conspiracy.* Such action is not the sort that may legitimately assume immunity. This Court emphasized in *Parker* that "the state in adopting and enforcing the [challenged] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly . . . ." 317 U.S. at 352. Yet that is exactly the sort of action with which the Board members are here charged.

Even if the members of the Board are removed from the alleged conspiracy, the Rule would still be invalid. For, as has been outlined above at pp. 13-18, the Rule was created and adopted by the private optometrists of Texas, not by the Board. The state never exercised its essential policymaking role with respect to the Rule, which must be regarded simply as an agreement among private individuals.

The only valid reason for granting immunity under the antitrust laws to a state administrative regulation is the assumption that the state considered the public benefit flowing from the regulation to override whatever anticompetitive effects the regulation might have. Proof, not only

that the public interest was ignored, but also that the motives of those persons who drafted and approved the Rule were solely anticompetitive would destroy this justification for immunity and require invalidation of the Rule.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted, and this case should be given plenary consideration by this Court, with briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX A

Opinions Below

1. In the Supreme Court of Texas

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY et al., Petitioners,

v.

Ellis CARP et al., Respondents.

No. A-11478.

Supreme Court of Texas.

Feb. 8, 1967.

Suit against Texas state board of examiners in optometry and certain of its members for judgment declaring invalid professional responsibility rule adopted by board. Judgment adverse to plaintiffs rendered by District Court, Dallas County, Dallas A. Blankenship, J., was reversed in part and affirmed in part by Dallas Court of Civil Appeals, Fifth Supreme Judicial District, 401 S.W.2d 639, and defendants petitioned for review. The Supreme Court, Pope, J., held that rules promulgated by board of examiners in optometry prohibiting fee splitting by licensed optometrist with unlicensed person and division of fees by treating optometrist with another optometrist and practice of optometry under assumed or trade names and requiring presence of optometrist at office with which his name is identified and at which he holds himself out as practitioner were not new and in-

consistent provisions to Optometry Act and were consistent with one or more of its specific proscriptions and were valid.

Judgment of Court of Civil Appeals reversed and judgment of trial court affirmed.

Smith, J., dissented.

Crawford C. Martin, Atty. Gen., Hawthorne Phillips and John Reeves, Asst. Attys. Gen., Will Garwood and Tom Gee, Sp. Asst. Attys. Gen., Niemann & Babb, Charles N. Babb, Austin, Strasburger, Price, Kelton, Miller & Martin, Mark Martin, Dallas, for petitioners.

Price Daniel, Austin, Douglas E. Bergman, Dallas, Keith, Mehaffy & Weber, Quentin Keith, Beaumont, for respondents.

Pope, Justice.

Doctors Ellis Carp, S. J. Rogers, and N. Jay Rogers sued The Texas State Board of Examiners in Optometry and sought a declaratory judgment that the Professional Responsibility Rule adopted on December 21, 1959 by the Board was void. They also asked for a permanent injunction against the Board's enforcement of the rule. The trial court denied the relief prayed for and sustained the validity of the rule. The court of civil appeals held that although there was substantial evidence which supported the rule, the Board exceeded its delegated powers in promulgating it and therefore, the rule was invalid. 401 S.W.2d 639. In our opinion the Board did not exceed its statutory powers in promulgating the rule. We reverse the judgment of the intermediate court and affirm that of the trial court.

The court of civil appeals held that the rule was not arbitrary or capricious and that there was substantial

evidence of the relationship between the rule and the general welfare of the citizens of Texas. We too find that the rule is grounded upon substantial evidence. The necessity for such a rule was demonstrated by the general support it received from the members of the optometry profession and the professional societies and the record which abounds with evidence of the specific evils the rule was designed to correct. Some portions of the record will be mentioned and commented on in our analysis of the specific provisions of the rule.

The central question presented by the points before us is whether the Board exceeded its delegated powers in promulgating the Professional Responsibility Rule. In determining this issue, we must examine the general purposes of the Optometry Act as well as certain specific provisions of the act. The Legislature's primary purpose in passing the act was to assure and protect the personal and professional relationship between an optometrist and his patient. To make certain that this purpose was carried out, the act requires an optometrist to be licensed before he may practice within the state. The optometrist must evidence his identity and professional qualifications by registering and recording his license in any county in which he practices. Articles 4561–4562[1]; article 735 Vernon's Ann. Penal Code. He must also display his license in his office, and when he practices away from his office, he must identify himself by affixing to each bill for glasses his signature, address and the number of his license. Article 736, Vernon's Penal Code. Personal identification by those practicing any of the healing arts is of such significance that the Legislature requires a licensee to identify the particular system which his license permits him

[1] Unless indicated otherwise, all articles cited in this opinion are contained in Vernon's Civil Statutes.

to practice. Article 4556. It is in this statutory context of fixing professional identification and personal responsibility that we now examine the powers delegated to the State Board of Examiners in Optometry and the provisions of the particular statutes and the rule which the Board promulgated. Article 4556 is the source of the Board's rule-making authority. It provides:

> "• • • The Board shall have the power to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act. • • •"

Article 4563 provides that the Board of Examiners may refuse to issue a license to an applicant and may cancel, revoke or suspend any license it has granted for any of the following reasons:

> "(a) That said applicant or licensee is guilty of gross immorality;
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> "(b) That said applicant or licensee is guilty of any fraud, deceit or misrepresentation in the practice of optometry or in his seeking admission to such practice;
>
> "(c) That said applicant or licensee is unfit or incompetent by reason of negligence;
>
> "(d) That said applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;
>
> "(e) That said applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine or other drugs having similar effect or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

"(f) That said licensee has directly or indirectly employed, hired, procured, or induced a person, not licensed to practice optometry in this State, to so practice;

"(g) That said licensee directly or indirectly aids or abets in the practice of optometry any person not duly licensed to practice under this Act;

"(h) That said licensee directly or indirectly employs solicitors, canvassers or agents for the purpose of obtaining patronage;

"(i) That said licensee lends, leases, rents or in any other manner places his license at the disposal or in the service of any person not licensed to practice optometry in this State;

"(j) That said applicant or licensee has wilfully or repeatedly violated any of the provisions of this Act."

The questioned Professional Responsibility Rule, except for its severability clause, is copied in the footnote to Texas State Board of Examiners in Optometry v. Carp, 388 S.W.2d 409, 411-412 (Tex. 1965). The footnote to the opinion of the court of civil appeals, 401 S.W.2d 639, 640-641, is a good summary of section 1 of the rule, which we adopt. Section 1 provides that no optometrist shall:

"(a) Divide, share or split fees with any lay person, firm or corporation. However, it shall not be construed a violation of the Rule if an optometrist (1) pays an employee in the regular course of employment, or (2) leases space on a percentage or gross receipts basis; and (3) he may sell or assign accounts receivable.

"(b) Divide, share or split fees with another optometrist or physician except (1) on a division of

services and (2) then only with the knowledge of the patient, but (3) the Rule will not be interpreted to prevent partnerships.

"(c) Practice under or use an assumed name in connection with his practice. However (1) partners may practice under their full or last names, and (2) optometrists employed by other optometrists may practice under their own names in an office listed in the names of their employers.

"(d) Use or allow his name or professional identity to be used on the door, window, wall or sign of any office or location where optometry is practiced unless said optometrist is actually present and practicing therein during office hours.

"(e) Practice in any office or location where any name or professional identification on any sign shall indicate that such office or location is owned, operated or supervised by any person not actually present and practicing therein during office hours.

"(f) Requirements (d) and (e) above shall be deemed satisfied if the optometrist is (1) physically present more than half the total hours the office is open for at least nine months of the year; or (2) physically present in such office at least one-half the time such person conducts, directs or supervises any practice of optometry; or (3) regularly makes personal examinations of eyes at such location or regularly directs or supervises such examinations."

Section 2 of the rule provides that the wilful or repeated failure of an optometrist to comply with any provision of section 1 shall be considered prima facie evidence that such optometrist is guilty of a violation of law, and shall

be grounds for filing charges to cancel, revoke, or suspend his license or to enjoin him from continuing such violation. Section 3 of the rule provides that if any part of the rule be held invalid, the intent of the Board was to promulgate the remainder of the rule.

The court of civil appeals in striking down the rule in its entirety, held that article 4563 and other statutes stated specific grounds for refusing or cancelling a license, that the statement of specific grounds was an exclusion of all others, and that the Legislature intended that the Board should not add new or inconsistent grounds. The authorities in support of the legal principles applied by the court of civil appeals are listed in the court's opinion. Our opinion is, however, that each provision of the rule must be separately examined to determine whether it is related to and consistent with the grounds for cancellation or refusal that the Legislature listed. In other words, the real question presented is whether the rule states new or inconsistent grounds as held by the intermediate court.

In Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957), this court sustained the validity of three rules that the Board of Optometry promulgated. These rules regulated "bait" advertising, basic competence, and corporate practice of optometry. The court held that article 4556 was a broad delegation of regulatory powers to the Board since it authorized the Board to adopt such rules as are necessary for "the regulation of the practice of optometry." The court also held that each of the rules was consistent with, related to, and implementation of one or more of the prohibited categories set out in article 4563. The Professional Responsibility Rule which is under attack prohibits five forms of practice by those licensed as optometrists, and as in Kee v. Baber, we shall examine each of the prohibited practices with reference to article 4563 and other optometry regulations.

Section 1(a) of the rule prohibits fee-splitting by a licensed optometrist with an unlicensed person. Since the Optometry Act forbids an unlicensed person to directly charge fees for optometric services, such a person cannot undermine the act by indirectly charging and collecting fees through the device of fee-splitting. The prohibition of fee-splitting with laymen is generally related to the personal and professional relationship between optometrist and patient which is requisite to the practice of optometry and is specifically related to article 4563(b) which prohibits a "deceit or misrepresentation in the practice of optometry * * *." It is related to article 4563(h) which authorizes revocation of a license when the "licensee directly or indirectly employs solicitors, canvassers, or agents for the purpose of obtaining patronage," and article 773, Vernon's Penal Code, which provides that no optometrist may "employ or agree to employ, pay or promise to pay, or reward or promise to reward any person, firm, * * * for securing, soliciting or drumming patients or patronage." It is related also to article 4563(i) since a licensee who shares his professional fees with an unlicensed person "places his license at the disposal or in the service of a[ny] person not licensed to practice optometry in this State."

Section 1(b) of the rule prohibits a division of fees by a treating optometrist with another optometrist. This section is subject to some exceptions but even then the fee-splitting is permissible only with the knowledge of the patient. This section is relevant to the same provisions of the Optometry Act as section 1(a). Section 1(b) protects the same personal and professional relationship between the optometrist and his patient and that purpose runs through the whole act. The section is relevant to article 4563(b) because the treating optometrist holds himself out to his patient as the one who is performing the services

and is to be paid upon the basis of those services. A patient who ignorantly pays optometric fees based upon elements other than service alone and which fees are paid to absentee optometrists is misled.

Section 1(c) of the rule prohibits the practice of optometry under assumed or trade names. The reason for this section is that the trade or assumed name practice, like fee-splitting, disrupts the optometrist-patient relationship by concealing the identity and burying the responsibility of the licensed optometrist. The need for section 1(c) is clearly supported by substantial evidence some of which we shall now summarize since it demonstrates the relevance of this section to the provisions of article 4563. Dr. Carp operates seventy-one offices in Texas. He advertises them under the following trade names: Luck Optical, Luck One Price Optical, Mast Optical, Mesa Optical, Mack Optical, Plains Optical, Amarillo Optical, Lubbock Optical, Panhandle Optical, and Mission Optical. From time to time he adds, drops, or changes the trade name at a particular office although the licensed optometrists employed in that office remain the same. He has purchased the practices of licensed optometrists and practices under their name although they are no longer associated with the respective offices in any manner. Illustrative of Dr. Carp's trade or assumed name practice is the situation that exists in Wichita Falls. Within a two-block area in that city, Dr. Carp maintains offices operated under the names of Mast Optical, Luck Optical, and Lee Optical. The same supervisor oversees these three offices. Each office dispenses the same optical goods and services and uses the same kind of equipment. Optometrists are shifted from one location to the other. Dr. Carp's advertising represents to the public that these three offices are in competition with each other thereby creating the false impression that they are each indepen-

dently owned and operated. Similar situations exist in Dallas and El Paso. On the other hand, Texas State Optical, owned by the Doctors Rogers, operates eighty-two offices in Texas and advertises only under the one trade name. Although no trade name can be licensed to practice optometry, Texas State Optical advertises by the use of such statements as "a scientific TSO eye examination."

The practice of optometry under a trade name is a holding out to the public that the trade name is licensed. The result is that the identity of the licensed practicing optometrists is hidden behind the unlicensed trade name. Prescriptions belong to those operating the trade name business rather than the prescribing optometrist. The practice is confusing and misleading to the public. In Kee v. Baber, supra, this court upheld a Board rule which required an optometrist to separate his practice from the business operations of mercantile establishments, and did so on the grounds that it was a safeguard for the optometrist-patient relationship and would avoid confusion on the part of the public. The court there held that the rule which prohibited corporate practice of optometry was reasonably referable to article 4563(i), which prohibits placing an optometrist's license "in the service or at the disposal of unlicensed persons." Practice under a trade name is similar to practice under a corporate name which was denounced in *Kee*. Section 1(c) is also reasonably referable to article 4563(b) which prohibits "deceit or misrepresentation in the practice of optometry." See also article 738a, Vernon's Penal Code.

The practice of a profession under a trade name has often been regulated and prohibited by rules. Fisher v. Schumacher, 72 So.2d 804 (Fla.1954); Pearle Optical of Monroeville Inc. v. Georgia State Board of Examiners in Optometry, 219 Ga. 364, 133 So.2d 374 (1963); State Board of Dental Examiners v. Bohl, 162 Kan. 156, 174 P.2d 998

(1946); Silverman v. Board of Registration in Optometry, 344 Mass. 129, 181 N.E.2d 540 (1962); Toole v. Michigan State Board of Dentistry, 306 Mich. 527, 11 N.W.2d 229 (1943); State Board of Optometry v. Orkin, 249 Miss. 430, 162 So.2d 883 (1964); Strauss v. Univ. of New York, 2 N.Y.2d 464, 161 N.Y.S.2d 97, 141 N.E.2d 595 (1957); Strauss v. Univ. of New York, 282 App.Div. 593, 125 N.Y.S.2d 821 (1953); Straus Inc. v. Univ. of State of New York, 186 Misc. 242, 59 N.Y.S.2d 429 (Sup.Ct.1945); 41 Am.Jur. Physicians and Surgeons § 52 (1942); 70 C.J.S. Physicians and Surgeons §§ 31, 33 (1951).

Sections 1(d), 1(e), and 1(f) of the rule require and assure the presence of an optometrist at the offices with which his name is identified and at which he holds himself out as a practitioner. Substantial evidence was presented to prove that such rules were needed to correct the evil of misleading representations to the public. Named optometrists have been identified with scores of widely separated offices in Texas, notwithstanding the fact that they have neither practiced at nor been inside many of the places with which their names are associated. Dr. Carp has advertised and practiced under the names of Douglas Optical, Shannon Optical, Pearl Optical, Lee Optical, Lee Optical Company and Dr. L. H. Luck. Those are the names of licensed optometrists who sold Dr. Carp their locations and the use of their names but continued their practice independently of Dr. Carp.

Texas State Optical's advertising leaves the impression that one of the Doctors Rogers is present at a particular office. Actually they have neither been inside nor seen some of their eighty-two offices distributed generally over Texas. They list their names in phone books in cities where they do not purport to practice optometry and on plaques showing the names of the optometrists who serve particular of-

fices though they do not in fact practice at such offices. Since such practices are deceptive and misleading, sections 1(d), 1(e), and 1(f) are relevant to article 4563(b). Toole v. Michigan State Board of Dentistry, supra, and Campbell v. State, 12 Wash.2d 459, 122 P.2d 458 (Wash. 1942).

We conclude that the court of civil appeals erred in its holding that the Professional Responsibility Rule added new and inconsistent provisions to the Optometry Act. To the contrary, our opinion is that the rule's provisions are in harmony with the general objectives of the act and referable to and consistent with one or more of its specific proscriptions. We believe that the Legislature, by investing the Board with broad rule-making powers "[for] the enforcement of this Act" and "[for] the regulation of the practice of optometry," contemplated that the Board would use these powers to correct the evils generally classified in article 4563, or some other provision of the Optometry Act. If these rule-making powers did not authorize the Board to regulate evils not encompassed in the specific wording of the act, they would be nothing more than meaningless excess.

Respondents urge two additional reasons in support of the judgment of the court of civil appeals—the case of Southwestern Bell Tel. Co. v. Texas State Optical, 253 S.W.2d 877, (Tex.Civ.App. 1952, no writ) and the legislative history of the Optometry Act. In the *Southwestern Bell Tel. Co.* case the Doctors Rogers brought an injunction suit and compelled the telephone company to list Texas State Optical, the trade name, in the yellow pages of the Port Arthur telephone directory. At that time the Board had not yet undertaken to implement the act. The case did not come to this court, and the opinion contains a number of holdings that are inconsistent with our views expressed above. The court held that "[t]he fact that no license to

practice optometry has been issued to 'Texas State Optical' is not material." The decision reflects an absence of factual background about the evils of the trade name practice of optometry as evidenced by its holding that such practice is not against the public interest so long as the public by making a search can discover the persons using the name. We disapprove these holdings. Whether the telephone company should list an optometrist's trade name is not the same issue as that of the Board's power to make rules prohibiting practice under a trade name.

Respondents urge that the Legislature did not enact proposed legislation which would have prohibited trade name practice of optometry and fee-splitting. The argument is that the original Optometry Act, as introduced, had a provision which prohibited the practice of optometry under any name other than a licensee's own proper name and also had a provision which would have made it a penal offense to falsely impersonate any person licensed as an optometrist. Acts 46th Leg.R.S.1939, ch. 4, pp. 360–368. Before passing the bill, the Legislature deleted the sections which prohibited trade name practice, Vol. II House Journal, 46th Leg. 1939, pp. 2529–2534, and fee-splitting, Senate Journal, 46th Leg.1939, pp. 1958–1968. Respondents urge that the Legislature by deleting the prohibitions against the practices from the bill, implied an intent that such practices should be permitted. Respondents' reasoning is that "[n]o court should read into a statute by implication that which both Houses of the Legislature have expressly rejected * * *." Grasso v. Cannon Ball Motor Freight Lines, 125 Tex. 154, 81 S.W.2d 482 (1935).

The Legislature did not adopt specific prohibitions of trade name practice and fee-splitting; however, any implications which might be derived from that action are overcome by the Legislature's express grant of broad rule-

making powers to the Board. Kee v. Baber, supra. The Legislature expressly empowered the Board to make rules to regulate the practice of optometry and enforce the act. Rather than an implied limitation of Board powers, the act extended the powers of the Board. Instead of an implied grant of permission to practice under a trade name, the act's rule-making provision empowered the Board to make appropriate rules grounded upon substantial evidence of the evils against which the public should be protected. Gibbs v. United States Guarantee Co., 218 S.W.2d 522 (Tex.Civ.App.1949, writ ref.). In Kee v. Baber, supra, this court so treated the grant of rule-making powers and we sustained the rule which prohibited corporate practice of optometry on the reasoning that it implemented the Legislature's prohibition against placing an optometrist's license "in the service or at the disposal of unlicensed persons." On similar reasoning, the Board had the power to prohibit the same result under a different scheme. The trade name entity is no more a licensee than a corporate entity. The Board passed its rule after substantial evidence showed that a widespread practice existed in Texas which undermined sections (b), (h), and (i) of article 4563 and the general purpose of the act to identify and establish personal responsibility of the licensee. It is our opinion that the Legislature in failing to enact the specific provisions, intended instead to provide a better method for the Board to regulate the profession, and that it did this by an express authorization for the Board to tailor and make its rules for the particular needs of the profession and the public so long as they are relevant to the statutory proscriptions.

We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

SMITH, J., dissenting.

DISSENTING OPINION

SMITH, Justice.

I respectfully dissent. The Legislature provided in Article 4563 ten grounds for refusing or canceling the license of an optometrist. The rule now under attack was adopted by the Texas State Board of Examiners in Optometry. In my opinion, each of the rules' outright proscriptions has been added as a new ground to those enumerated by the Legislature for the revocation of licenses. Since the Legislature through the enactment of Article 4563 has definitely listed the reasons authorizing the Board, in its discretion, to refuse to issue a license to any applicant in the first place, and to cancel, revoke or suspend the operation of any license by it granted, any rule adopted by the Board must by its own terms be referable to or related to a specific provision of Article 4563. An examination of the specific provisions of Article 4563 and the provisions of the rules under attack leads me to conclude that each provision is an outright and independent proscription. The forbidden acts as stated in Section 1 of the rule are not by their own terms referable to or related to any specific provisions of Article 4563. On this point I can add very little to the holding of the Court of Civil Appeals, 401 S.W.2d 639. However, I do wish to emphasize that when the Legislature said to the Board that it may cancel, revoke or suspend a license for ten specific reasons, it negatived any other grounds that might have been permitted under general rule-making powers. See State v. Mauritz-Wills Co., 141 Tex. 634, 175 S.W.2d 238, 241 (1943); 41 Am.Juris. 172, Physicians & Surgeons, 44; Graeb v. State Board of Medical Examiners, 55 Colo. 523, 139 P. 1099, 1101, 47 L.R.A.,N.S., 1063 (Sup.Ct.

Colo.1913). This latter case involved a Colorado statute which assigned nine specific "acts and conduct as may justify the revocation of a license". The Court held: "[q]uite clearly the causes designated in the statute are exclusive, and the maxim, 'expressio unius est exclusio alterius,' applies. * * *"

The Board contends and this Court seems to approve the contention that the rule under attack does not add new offenses to those listed in Article 4563. Both the Board and the Court rely heavily upon our holding in Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (Sup.Ct.1957). In considering and approving the *Kee* case, I was of the opinion and still maintain that the rules considered in *Kee* were specifically tied to and closely related to specific sections of Article 4563. The rules there involved were designed to implement rather than to add a new and independent rule. Our decision in *Kee* stressed the idea and, in fact, the Court found that the board rule-making powers (emphasized by the Court in the present case) were intended "to vest the Optometry Board with authority to *fill in the details relating to the proscribed actions.*" [emphasis added]. My analysis of *Kee* leads to the conclusion that this Court was not holding in *Kee* that the Board could do the proscribing itself. In our case, the Board makes no contention that the rule under attack in any manner is enacted to fill in the details or in implementation of a prospective enactment. The Board is seeking, at the hands of this Court, power to make the proscriptions in the first instance and for such rules to have the force of law just as though the Legislature had included them in the statute. I respectfully maintain that an administrative agency may not enlarge the causes for which a license may be revoked or suspended. See Cherry

v. Board of Regents of the University of State of New York, 289 N.Y. 148, 44 N.E. 2d 405 (1942). In *Cherry*, the Court held that since the New York Legislature has enumerated the reasons for suspension or revocation of licenses, the Board cannot, by adoption of rules, add to the statutorily enumerated grounds. The Court said in *Cherry*:

> "[W]e have said that the Board of Regents' 'specific supervisory powers over the practice of dentistry • • • enable it, within reasonable limits, to prescribe canons by which conduct deemed by it, in the exercise of fair judgment, to be unprofessional and objectionable may, in the interest of rescuing that profession from vulgar commercialism, be banned.' Matter of Dr. Bloom Dentist, Inc., v. Cruise, 259 N.Y. 358, 363, 182 N.E. 16, 17. The field in which that power may be exercised is nonetheless subject to restriction by the Legislature, and even within the field in which the Legislature has delegated to the Board of Regents power to prescribe canons banning conduct which it deems unprofessional and objectionable, the Board of Regents cannot by the exercise of that power enlarge the causes for which the license of a dentist may be revoked or suspended, as defined in subdivision 2 of section 1311.
>
> "• • •
>
> "[T]he bill which had been introduced in the Legislature defining the grounds for the revocation of a dentist's license included as an additional ground 'that the dentist has violated the rules of the regents governing advertising or any other rules.' That ground was stricken out before the bill was passed.

"• • • •

"[T]he Legislature has, itself, specified the grounds upon which a license to practice dentistry may be suspended or revoked. The Legislature has not delegated to the Board of Regents power to create offenses which shall furnish additional grounds."

Here again, I wish to emphasize that the Court in the present case has misconstrued its holding in Kee v. Baber, supra. We simply held in that case that the Board may enact such rules and regulations as would be consistent with the power given it under the provisions of Article 4556.

It is my position that the broad regulatory powers given to the Board in Article 4556 were to be exercised by the Board in a manner consistent with Article 4563. The Legislature has not only enumerated specific grounds for license revocations, it has also set forth detailed and specific offenses which would constitute violations of the Act. The Legislature has pre-empted the field of punishable offenses as well as grounds for license revocation. This action prevails over its general grant of power to the Board "to make such rules and regulations not inconsistent with this law as may be necessary for • • • the regulation of the practice of optometry and the enforcement of this Act."

To further demonstrate that the Board is seeking rule-making power in the field of license revocation regardless of statutory limitations, I take up its argument that the Board has the same license revocation powers as those given to the Supreme Court and the State Bar. In advancing this argument, the Board fails to distinguish between the fact that the Optometry Act enumerates the reasons for revocation of licenses, whereas the State Bar Act does not do so. Article 320a–1, Sec. 4, subdivision (a) provides:

"From time to time as to the Court may seem proper, the Supreme Court of Texas shall prepare and propose rules and regulations for disciplining, suspending, and disbarring attorneys at law; for the operation, maintenance and conduct of the State Bar and prescribing a code of ethics governing the professional conduct of attorneys at law. * * *"

The 46th Legislature enacted both the State Bar Act and the Optometry Act. The State Bar Act authorizes the Supreme Court to enumerate the grounds and procedures for suspension or cancellation of licenses and the means of enforcement. This is not true with the Optometry Act. Whatever its reasons for making this distinction might have been is beside the point; the fact remains that the Legislature in adopting the Optometry Act deliberately enumerated the grounds for cancellation and revocation and set up by penal statute the means of enforcement. Therefore, the Board has no authority to add new grounds and new procedures for license revocations under the general powers set out in Article 4556. See Kentucky State Board of Dental Examiners v. Crowell, 220 Ky. 1, 294 S.W. 818, 819 (Ct. of App.Ky.1927); 2 Am.Jur. 2d 130, Administrative Law § 301; Cherry v. Board of Regents of the University of the State of New York, supra.

Respondents in their conditional application for writ of error and in a supplemental brief filed herein present additional points[1] for declaring the rule under attack invalid.

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[1] "STATEMENT OF RESPONDENTS' CROSS-POINTS

"FIRST CROSS-POINT

"The rule is arbitrary and capricious and bears no reasonable relationship to the health and wellbeing of the citizens of Texas, and the Trial Court and the Court of Civil Appeals erred in not so holding.

I think these points merit consideration. In my opinion the rule is arbitrary and capricious and bears no relationship to the health and well being of the citizens of Texas. The rule is invalid because there was no substantial evidence to support a finding that the rule bears any reasonable relationship to the public health and welfare. Respondents pleaded in the trial court that the "rule is arbitrary and capricious in that it does not have or bear any substantial relationship to the protection of the public in its dealings with persons licensed to practice optometry under the laws of the State of Texas." The Court of Civil Appeals quotes some of the evidence on this question. The record contains evidence concerning the care exercised in the selection of employee-optometrists by one of the Respondents' organizations. This evidence relates to the educational background of the optometrists selected, the fact that they were licensed by the Board and their practical experience, etc. With reference to the "Professional Responsibility" phase of the rule under attack, one of the Respondents, who is also a member of the Board, testified:

"SECOND CROSS-POINT

"The rule is invalid because there was no substantial evidence to support a finding that the rule bears any reasonable relationship to the public health and welfare, and the Trial Court and Court of Civil Appeals erred in not so holding.

"THIRD CROSS-POINT

"The rule is invalid because the same would impair the obligation of contracts in violation of both the state and federal constitutions and would take Respondents' property without due process of law, and the Trial Court and the Court of Civil Appeals erred in not so holding.

"FOURTH CROSS-POINT

"The rule is invalid because its arbitrary and capricious nature would take Respondents' property without due process of law, and the Trial Court and the Court of Civil Appeals erred in not so holding."

"Q. Now, Dr. Rogers, when a man is employed, an optometrist in your organization, do you have any standing instructions as to how he shall conduct the practice and to whom his first and primary allegiance and responsibility is?

"A. Yes, we do.

"Q. And what is that?

"A. Well, number one, the man, as I mentioned is solely responsible for his action with that patient, for his—whatever he does or doesn't do with regard to the patient and his sole allegiance, his sole responsibility, is to do what in his opinion is necessary or best or in the best interest of that patient or that patient's visual care. This is the basis upon which all of our offices operate and this is the way a man conducts himself, just as though he were in his own office."

The Board wholly failed to establish its contention that a person employed by another optometrist in a trade-name organization lacks professional responsibility to this patient. In fact this contention was refuted by the following testimony:

"Q. Now in all of your experience, Dr. Rogers, as an optometrist, and as a Board member, now something in excess of six years, I will ask you the point blank question, are optometrists practicing on a salary, or a compensatory basis, on a solely employed basis, and in a trade name organization such as yours, are they just as competent, just as sincere, just as diligent as those who practice solely or individually?

"A. Yes, I think so, I sincerely do."

The Respondent, Dr. Carp, also testified:

"Q. Doctor, let me ask you this question: As an optometrist, who is the primary responsibility of an

individual doctor associated with you in one of your offices where is his primary responsibility, to you or to the patient whose eyes he examines?

"A. By all means to the patient."

There is a complete absence of testimony given by patients or others which even remotely suggested that the care given to patients in Respondents' establishments located throughout the State was any less satisfactory to the patient, than the care given in the offices of individual practitioners. There is no evidence that the practice of optometry under trade or assumed names in multiple offices injuriously affects the public health.

It is argued that other jurisdictions have adopted rules similar to the one under consideration. Grant this is true, still the Board has made no showing that conditions were the same in each instance. There is no showing that the Legislatures in the other jurisdictions have refused to adopt the essential proscriptions contained in the rule under attack. On the other hand, it is clear that the Texas Legislature has consistently declined to include in its enactments the unconstitutional proscriptions contained in the Board rule now before us. A court cannot substitute its judgment for that of the legislative branch of the government. There is no provision of the Board's rule here involved that bears any reasonable relationship to the public welfare. It is clear that the rule is advanced for the economic protection of a particular class rather than for the protection of the public generally. There is no evidence of any *need* for the regulation insofar as the public is concerned. Simply stated, the Board has failed to discharge its burden that there was substantial evidence in existence at the time of the adoption of the rule to justify its adop-

tion. See Kost v. Texas Real Estate Commission, 359 S.W. 2d 306, (Tex.Civ.App.1962, writ ref'd). Not only has the Board failed in this regard, but more important, it has, in adopting this rule, exceeded the authority conferred upon it by law. In striking down a regulation promulgated by a Board, this Court in Teachers Retirement System of Texas v. Duckworth, 153 Tex. 141, 264 S.W.2d 98 (1954) adopted the opinion of the Court of Civil Appeals, Tex.Civ.App., 260 S.W.2d 632. The adopted language which is applicable here reads:

> "Even if it can be said that the regulation adopted by the Board making the last payment due on the last day of the month next preceding the month in which the beneficiary dies has the effect of canceling the exceptions to the common-law rule against apportionment which would otherwise be applicable to this case, we are inclined to agree with appellee that the judgment must still be sustained because, as contended by her, the Board was without power to adopt and enforce the regulation. It has been held in this State that the Board of Insurance Commissioners can exercise only the authority conferred upon it by law '* * * "in clear and unmistakable terms, and will not be deemed to be given by implication, nor can it be extended by inference, but must be strictly construed." * * *' Commercial Standard Ins. Co. v. Board of Insurance Com'rs of Texas, Tex.Civ.App., 34 S.W.2d 343, 345, writ refused. And in like manner has the power of the Railroad Commission of Texas been construed."

There is another reason which is perhaps greater than any reason thus far advanced to support the argument that

the rule should be stricken down by the courts. The rule strikes at the fundamental right of an optometrist to lawfully engage in his profession. I agree with the Respondents that the rule impairs the obligation of contracts. Not only that, it is arbitrary and capricious in nature and has been adopted without regard to the law as enacted by the Legislature and in violation of both the state and federal constitutions. The rule amounts to a taking of Respondents' property without due process of law. The rule has not been enacted for the benefit of the public, but to the contrary there is every indication that the rule has been adopted to protect the economic welfare of a few optometrists, despite the fact that the rule will place in jeopardy property rights which the Legislature has thus far chosen to safeguard. Some of the consequences of this unwarranted rule will be to prohibit the use of an assumed name in the practice of optometry and to impose strict limitations on the operation of multiple offices and the splitting of fees with employee-optometrists. The maintenance of 82 offices at many locations in Texas, at a cost of between $10,000.00 and $12,000.00 per office and at a cost of more than $1,000,000.00 in publicizing the assumed name "Texas State Optical", so far as the record shows, means nothing to the relators, but it should have some significance to this Court in deciding the question of the validity of the rule. In this connection, I repeat that there is no evidence in the record which would tend to show any public need or necessity for the rule. To the contrary, the rule arbitrarily interferes with private business in that it imposes unnecessary restrictions upon the lawful occupation of the respondents, Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894).

The Courts should not hesitate to intervene to protect the property rights of a citizen when it is discovered from

a record such as we have here that a Board has exceeded its powers under the guise of the exercise of the police power of the State. This Court in the case of Houston & T. C. R. Co. v. Dallas, 98 Tex. 396, 84 S.W. 648, 70 L.R.A. 850 (1905), in considering the exercise of the police power, has this to say:

> "The power is not an arbitrary one, but has its limitations. It is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort, and convenience as consistently as may be with private property rights. As those needs are extensive, various, and indefinite, the power to deal with them is likewise broad, indefinite, and impracticable of precise definition or limitation. But as the citizen cannot be deprived of his property without due process of law, and as a privation by force of the police power fulfills this requirement only when the power is exercised for the purpose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists, it may often become necessary for courts, having proper regard to the constitutional safeguard referred to in favor of the citizen, to inquire as to the existence of the facts upon which a given exercise of the power rests, and into the manner of its exercise, and if there has been an invasion of property rights under the guise of this power, without justifying occasion, or in an unreasonable, arbitrary, and oppressive way, to give to the injured party that protection which the Constitution secures."

This Court supported its position with a quotation from Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499 (1894) which reads:

"* * * [t]o justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

In the case of Smith v. Decker, 158 Tex. 416, 312 S.W.2d 632 (1958), this Court held unconstitutional a statute which deprived citizens of the right to earn a living, a property right. In holding void the act there involved, we said:

"Appellants having a vested property right in making a living, subject only to valid and subsisting regulatory statutes, and being prevented from performing their business otherwise lawful but for the statute in question, we believe that we are permitted under the rule announced in Kemp Hotel Operating Co. v. City of Wichita Falls, [141 Tex. 90, 170 S.W.2d 217], supra, to order the issuance of the injunction. There it was stated that courts of equity may be resorted to for the purpose of enjoining the enforcement of a criminal statute or ordinance when same is void and when its enforcement invades a vested property right of the complainant."

The judgment of the Court of Civil Appeals should not only be affirmed, but this Court should go further and declared the rule unconstitutional.

2. In the Texas Court of Civil Appeals

Ellis Carp et al., Appellants,

v.

Texas State Board of Examiners in Optometry et al., Appellees.

No. 16669.

Court of Civil Appeals of Texas.

Dallas.

March 25, 1966.

Rehearing Denied April 15, 1966.

Suit was brought against the Texas State Board of Examiners in Optometry and certain of its members for a judgment declaring invalid the professional responsibility rule prohibiting the use of an assumed name in the practice of optometry and imposing strict limitations on the operation of multiple offices and the splitting of fees. The District Court, Dallas County, Dallas A. Blankenship, J., entered a judgment adverse to the plaintiffs, and they appealed. The Court of Civil Appeals, Dixon, C. J., held that the rule is invalid because beyond the powers delegated to the Board by the Legislature.

Reversed and rendered in part and affirmed in part.

See also, Tex., 388 S.W.2d 409.

Price Daniel, Austin, Douglas E. Bergman, Dallas, and Quentin Keith, Beaumont, for appellants.

Mark Martin, Dallas, Charles Babb, Waggoner Carr, Atty. Gen., Hawthorne Phillips and John Reeves, Asst. Attys. Gen., Tom Gee and Will Garwood, Sp. Asst. Attys. Gen., Austin, for appellees.

DIXON, Chief Justice.

This suit was filed by appellants Dr. Ellis Carp, Dr. S. J. Rogers and Dr. N. Jay Rogers against Texas State Board of Examiners in Optometry, hereinafter called the Board, and also against all but one of the members of the Board individually. Appellants pray for a judgment declaring invalid a rule adopted December 21, 1959 by the Board known as the Professional Responsibility Rule, referred to hereinafter as the Rule. Appellants also pray that the Board be permanently enjoined from enforcing the Rule. Permission for appellants to bring this action against the State of Texas was granted in Senate Concurrent Resolution No. 8, dated January 15, 1962.

Dr. N. Jay Rogers, one of the appellants, though a member of the Board, voted against the adoption of the Rule and joined other plaintiffs in bringing this suit.

The effect of the Rule is to prohibit the use of an assumed name in the practice of optometry, and to impose strict limitations on the operation of multiple offices and the splitting of fees. A summary of its provisions will be found in a footnote hereto.[1] The Rule itself is set out

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[1] In substance the Rule provides as follows:

Sec. 1. *No optometrist shall,*

(a) Divide, share or split fees with any lay person, firm or corporation. However, it shall not be construed a violation of the Rule if an optometrist (1) pays an employee in the regular course of employment, or (2) leases space on a percentage or gross receipts basis, and (3) he may sell or assign accounts receivable.

(b) Divide, share or split fees with another optometrist or physician except (1) on a division of services and (2) then only with

verbatim in a footnote to the opinion of our Supreme Court in Texas State Board of Examiners in Optometry et al. v. Carp et al., 388 S.W.2d 409, 411 (1965).

The Doctors Rogers testified that they maintain 82 offices at numerous locations in the State of Texas. Since 1939 they have operated under the trade name, "Texas State Optical". Dr. N. Jay Rogers testified that the average cost of setting up an office is between $10,000 and $12,000. In addition they usually are obligated to pay rent of $400 or $500 per month under a lease term of normally ten years. Over a period of 24 years preceding the trial they have spent more than a million dollars to publicize their assumed name.

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the knowledge of the patient, but (3) the Rule will not be interpreted to prevent partnerships.

(c) Practice under or use an assumed name in connection with his practice. However (1) partners may practice under their full or last names, and (2) optometrists employed by other optometrists may practice under their own names in an office listed in the names of their employers.

(d) Use or allow his name or professional identity to be used on the door, window, wall or sign of any office or location where optometry is practiced unless said optometrist is actually present and practicing therein during office hours.

(e) Practice in any office or location where any name or professional identification on any sign shall indicate that such office or location is owned, operated or supervised by any person not actually present and practicing therein during office hours.

(f) Requirements (d) and (e) above shall be deemed satisfied if the optometrist is (1) physically present more than half the total hours the office is open for at least nine months of the year; or (2) physically present in such office at least one-half the time such person conducts, directs or supervises any practice of optometry; or (3) regularly makes personal examinations of eyes at such location or regularly directs or supervises such examinations.

Sec. 2. The willful or repeated failure of an optometrist to comply with any of the provisions of Section 1 shall be considered prima facie evidence that such optometrist is guilty of violation of law, and shall be grounds for filing charges to cancel, revoke or suspend his license, or to enjoin him from continuing such violation.

Dr. Carp testified that he operates 71 offices in the State of Texas. He uses several assumed names, among them being "Lee Optical", "Luck One Price Optical", "Mack Optical" and "Mesa Optical". He employs 84 optometrists. He testified that he had spent three or four or five million dollars advertising the assumed name, "Lee Optical".

This suit was the subject of a mandamus proceeding before our Supreme Court, Texas State Board of Examiners in Optometry v, Carp, supra. The suit had gone to trial in the district court under the *preponderance of the evidence rule.* A jury was unable to agree to answers to several special issues, so a mistrial was declared. The Supreme Court in granting a writ of mandamus held that the case should have been tried under the *substantial evidence rule.* Since the facts had been fully developed and only issues of law remained to be resolved, the trial court was directed to enter an appropriate final, appealable judgment under the substantial evidence rule.

In its opinion the Supreme Court stated that there were two decisive questions of law in this case: (1) whether in adopting the Rule the Board acted within the powers delegated to it by the Legislature; and (2) if so, whether the Board's action was arbitrary, capricious or unreasonable because not supported by substantial evidence.

Following the pronouncement by the Supreme Court the district court proceeded to render judgment. The court held that the adoption of the Rule was within the lawful powers of the Board, was reasonably supported by substantial evidence, and has been in full force and effect since its adoption. It was ordered that appellants take nothing by their suit.

In their first two points on appeal appellants contend that (1) the Board in adopting the Rule exceeded the power delegated to it by the Legislature and (2) that the

Rule is inconsistent with the statute under which the Board operates. We agree with appellants and accordingly declare the Rule to be invalid and of no force and effect.

The subject of optometry is treated in our Civil Statutes in Articles 4552 to 4566–1, Vernon's Ann.Civ.St. For penal provisions see Articles 735–738a, Vernon's Ann. Penal Code.

In Article 4563 the Legislature has specifically listed the ten grounds upon which the Board in its discretion may refuse to issue a license, or may cancel, revoke or suspend a license.

The powers of the Board are set forth in Art. 4556, V.A.C.S. We quote the material part of the statute:

> "The Board shall have the power to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this act."

The cardinal rule in statutory construction is that courts should ascertain and be guided by the Legislature's intention. We recognize that Art. 4556, V.A.C.S. clothes the Board with "broad regulatory powers, many of which are somewhat discretionary in nature * * *." Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376, 378. We recognize also that the statutes relating to optometry are to be liberally construed to effectuate the purpose intended by the Legislature. Art. 10, Sec. 8, V.A.C.S. Nevertheless, a careful study of available records convinces us that it was not the intention of the Legislature to clothe the Board with the power it has exercised in adopting the Rule. In paragraphs which follow we shall state the reasons which have impelled us to this conclusion.

(1) By naming the ten grounds for refusing or canceling a license the Legislature in effect expressed its intention to exclude all others. The maxim, *expressio unius est exclusio alterius* (the naming of one thing excludes another) is applicable here. Though not conclusive the maxim has been pronounced a logical, sensible and sound rule of statutory construction. 53 Tex.Jur.2d 205-206. It has often been applied in determining the powers which have been or have not been delegated by the Legislature to administrative boards, commissions, licensing authorities and others. Commercial Standard Ins. Co. v. Board of Ins. Commissioners, 34 S.W.2d 343 (Tex.Civ.App.); Foshee Refining Co. v. State, 73 S.W.2d 1098, 1100 (Tex.Civ.App.); State v. Mapel, 61 S.W.2d 149, 152 (Tex.Civ.App.); State v. Mauritz-Wells Co., 141 Tex. 634, 175 S.W.2d 238; Ex parte Halsted, 147 Tex.Cr.R. 453, 182 S.W.2d 479, 484; Harris County v. Crooker, 112 Tex. 450, 248 S.W. 652, 655; Huntress v. State, 88 S.W.2d 636, 643 (Tex.Civ.App.); McCamey v. Hollister Oil Co., Tex.Civ.App., 241 S.W. 689 (aff. by 115 Tex. 49, 274 S.W. 562); Clark v. Briscoe Irr. Co., 200 S.W.2d 674, 682. The maxim has also often been applied in other jurisdictions. See Sutherland, "Statutory Construction", Vol. 2, p. 412, and 50 Am.Jur. 238.

(2) A principle of statutory construction closely akin to the *expressio unius* maxim is this: an administrative agency may implement and fill in details relating to statutory provisions listing or naming powers or activities granted or proscribed, but the agency may not by its own rules extend or add to the powers or activities listed in the statute. We think the principle is applicable here. In taking upon itself the task of listing in Art. 4563, V.A.C.S. the grounds upon which a license to practice optometry may be denied or canceled the Legislature plainly manifested its intention to retain such prerogative unto itself and not to dele-

gate it to the Board; and the Board lacks authority to add to the grounds named in the statute. Kelly v. Industrial Accident Board, Tex.Civ.App., 358 S.W.2d 874, 876; Teacher Retirement System of Texas v. Duckworth, 153 Tex.Civ. 141, 260 S.W.2d 632 (opinion of Court of Civ.App. adopted by 153 Tex. 141, 264 S.W.2d 98); Board of Ins. Commissioners v. Texas Employers Ins. Ass'n, Tex.Civ. App., 189 S.W.2d 47; Ketring v. Sturges, 372 S.W.2d 104 (Mo.); Golding v. Schubach Optical Co., Inc., 93 Utah 32, 70 P.2d 871.

(3) We believe the legislative intention was plainly manifested in 1953 when the Legislature rejected a proposed statutory amendment which would have prohibited the practice of optometry under an assumed name. The Beaumont Court of Civil Appeals on October 23, 1952 rendered a decision upholding the right of appellants Rogers to practice under an assumed name. Southwestern Bell Telephone Co. v. Texas State Optical, 253 S.W.2d 877 (1952), no wr. hist. In reaching its decision the court pointed out that neither under common law nor under our statutes was such practice prohibited; and that it was for the Legislature, not the courts, to change the law. The record before us shows that following this judicial decision House Bill No. 5 was introduced in the House of Representatives in 1953. The Bill as drawn prohibited the practice of optometry under an assumed name, and limited the number of offices of each practitioner to two. The Bill was rejected by the House. Thus the Legislature expressed its intention *not* to prohibit the practice of optometry under an assumed name and not to prohibit the operation of multiple offices. The rejection was all the more significant because it came with knowledge that the Beaumont court had held that in the absence of a statute forbidding it, the practice under an assumed name was not illegal.

In Grasso v. Cannon Ball Motor Freight Lines, 125 Tex. 154, 81 S.W.2d 482, 485, the Commission of Appeals in an opinion adopted by the Supreme Court had this to say:

"When we come to examine the legislative history of section 11 of article 911a, supra, we find that there is no escape from the conclusion that it was the legislative intent that such statute should not be construed so as to allow the insurance company to be joined in the same suit with the bus operator. When such statute, section 11, supra, which was contained in H.B. No. 50, Regular Session 40th Legislature, 1927, was pending in the Senate, an amendment thereto was offered to apply to such section. This amendment provided in express terms that the bus owner and his insurer could be sued in the same action. This amendment was duly adopted by the Senate, and was contained in the act as it originally passed that body. Senate Journal, 40th Legislature, Regular Session 1927, p. 673. Such provision was not in the act as it originally passed the House. After the act, of which section 11 is a part, was passed by the Senate with amendments, the bill was returned to the House as amended, and the House refused to concur in the Senate amendments. House Journal, Regular Session, 40th Legislature, 1927, p. 1175. The bill went to a free conference committee. The report of this committee, which was adopted by decisive majorities in both Houses, eliminated the above-mentioned Senate amendment. We think this history of the act evidences a legislative intent not to permit insurance companies under section 11, supra, to be joined in damage suits in the same action with the bus owners. Love v. Wilcox, 119 Tex. 256, 28 S.W.2d 515, 524 [70 A.L.R. 1484]."

"It is evident that section 11 of article 911a, supra, does not expressly authorize the joinder of the insurer in damage suits against the insured. If such right is held to exist, it must be put into the statute by implication. No court should read into a statute by implication that which both Houses of the Legislature have expressly rejected by decisive votes. On this question we will here quote from Judge Greenwood's opinion in Love v. Wilcox, supra: 'No court could justify putting into a statute by implication what both Houses of the Legislature had expressly rejected by decisive votes. The House and Senate Journals leave no room for doubt of the legislative intent to deny the power exercised by the State Committee in seeking to debar names from the primary ballots under the resolutions of February 1, 1930. Once the legislative intent is ascertained, the duty of the court is plain. To refuse to enforce statutes in accordance with the true intent of the Legislature is an inexcusable breach of judicial duty, because an unwarranted interference with the exercise of lawful, legislative authority.'"[3]

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[3] After this appeal had been submitted and orally argued appellants with our permission filed a supplemental brief to which was attached an exhibit containing certified copies showing the legislative history leading up to the passage in 1939 of the optometry statutes, including Art. 4563 which lists the grounds for refusing or canceling a license to practice optometry. These statutes, according to these certified copies, had their genesis in House Bill No. 410, which as originally introduced prohibited the use of assumed names. The House Committee to whom House Bill No. 410 had been referred changed the Bill so that it specifically authorized the trade name practice. When the Bill came to the floor the House refused to pass the Bill as originally introduced, or as recommended by the Committee. Both the provision prohibiting the assumed name practice and the provision authorizing it were stricken from the Bill before it was finally passed by the House and Senate and signed by the Governor in its present form.

Appellees object to our consideration of the exhibit attached to appellants' supplemental brief because said exhibit and copies were

Appellees frequently cite and quote from the opinion in Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957). In that case our Supreme Court passed on the validity of three rules adopted by the Board: (1) the "Bait Advertising Rule", (2) the "Basic Competence Rule" and (3) the "Corporate Practice Rule". It was held that these rules were valid; that the Board in adopting them did not exceed the powers delegated to it by the Legislature; that the rules were not contrary to or inconsistent with the Legislative Act; but were simply a proper attempt by the Board to *implement* the statutory provisions, especially Section (b) of Article 4563 pertaining to fraud, deceit or misrepresentation in the practice of optometry.

After a careful study of the Kee case and the three rules of the Board there under scrutiny we have concluded that the holdings there are not applicable here. The Supreme Court said that the three rules were adopted by the Board to implement and "to fill in the details relating to proscribed actions" of the statutory provisions. Since they implement but do not undertake to add to the list of statutory prohibitions listed in Art. 4563, V.A.C.S. they are not invalid. As previously stated in this opinion we think the Rule now

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not introduced in evidence at the trial of the case. Appellees contend that we cannot take judicial notice of them. It has been held that courts will not take judicial notice of a statute that has never been enacted. Dungan v. State, 156 Tex. Cr. R. 466, 243 S.W.2d 704 (1951). In the case now before us we are construing a statute which has been enacted though not in the exact form in which it was introduced as a Bill.

The rule in nearly all jurisdictions seems to be that the courts will take judicial notice of the legislative history of enacted statutes as shown in the Legislature's journals and other official records prior to passage of the statute. 31 C.J.S. Evidence 43, p. 997; Sutherland, "Statutory Construction", Vol. 2, p. 285.

However, we need not decide the question of judicial notice in regard to the contents of the challenged exhibit, for we have reached our conclusions and our decision in this case independently of said exhibit and without considering it.

before us for consideration does attempt to add to the prohibitions in Article 4563, though the Legislature has declined to add the very prohibitions which are set out in the Rule.

Appellants' first two points on appeal are sustained.

In their third and fourth points appellants contend that the Rule is arbitrary and capricious and has no support in substantial evidence. There is no merit in these points. If the Legislature had delegated authority to the Board to adopt the Rule we would be compelled to say that the Board's action is supported by substantial evidence. The statement of facts includes nearly 3,000 pages of testimony of many witnesses plus numerous exhibits. We declare the Rule invalid only because the Board in adopting it acted beyond the powers delegated by the Legislature. Appellants' third and fourth points are overruled.

The substance of appellants' points five, six, seven and eight is that the Rule violates both the Federal and State Constitutions because it impairs the obligation of contracts, takes or destroys appellants' property without due process, bears no reasonable relationship to the health and well-being of the citizens of Texas, is retroactive in its legal effect and permits the Board to delegate unlawfully its rule-making powers to outsiders (members of the profession of optometry).

If the Rule is unconstitutional it is only because (as we have held) in adopting it the Board exceeded the powers which the Legislature delegated to it. It is not unconstitutional for the reasons urged by appellants. It has long been settled that legislative bodies and administrative agencies with proper delegation of authority may regulate professions and businesses under the police power. Texas State Board of Examiners in Optometry v. Carp, Tex., 388 S.W.2d

409; Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376; Housing Authority of City of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 130 A.L.R. 1053; Texas Nat'l Guard Armory Board v. McCraw, 132 Tex. 613, 126 S.W.2d 627; Sherman v. State Board of Dental Examiners, Tex.Civ.App., 116 S.W.2d 843; Turner v. Bennett, Tex.Civ.App., 108 S.W.2d 967; International & G. N. R. Co. v. Railroad Commission of Texas, 99 Tex. 332, 89 S.W. 961; Lichter v. United States, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694; Lewis v. Michigan State Board of Dentistry, 277 Mich. 334, 269 N.W. 194; Williamson v. Lee Optical of Okla., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563; Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. Points five, six, seven and eight are overruled.

Appellants ask for but the trial court denied an injunction. Though we have declared the Rule invalid we see no occasion for the issuance of an injunction. The question of injunctive relief will arise only if and when the Board undertakes to enforce the Rule.

Because we believe that the Board exceeded its delegated powers in adopting the Rule we reverse the trial court's judgment and here render judgment declaring the Rule invalid and of no force and effect. The court's refusal to grant an injunction is affirmed.

Reversed and rendered in part and affirmed in part.

3. In the Supreme Court of Texas, on Writ of Mandamus (1965)

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY et al., Relators,

v.

Ellis CARP et al., Respondents.

No. A-10258.

Supreme Court of Texas.

Feb. 17, 1965.

Rehearing Denied April 7, 1965.

Original mandamus proceeding. The Supreme Court, Steakley, J., held that where action for declaratory judgment as to validity of professional responsibility rule adopted by state board of examiners in optometry had been fully developed in trial court and attack on rule involved only questions of law, and trial judge was mistaken in his belief that answers by jury to specific issues which he submitted were essential to rendition of judgment, the case was ripe for judgment and writ of mandamus was available to compel rendition of judgment.

Decision in accordance with opinion.

Smith, J., dissented.

Waggoner Carr, Atty. Gen., Austin, John Reeves, Asst. Atty. Gen., Tom Gee and Will Garwood, Sp. Asst. Attys. Gen., Strasburger, Price, Kelton, Miller & Martin, Dallas, Niemann & Babb, Austin, for relators.

Douglas E. Bergman, Dallas, Quentin Keith, Keith, Mehaffy & Weber, Beaumont, Jake Jacobsen, C. K. Richards, Austin, for respondents.

STEAKLEY, Justice.

This is an original mandamus proceeding. Relators are the Texas State Board of Examiners in Optometry, and others.[1] Respondents are Honorable Dallas Blankenship, Judge of the 101st Judicial District Court of Dallas County; Ellis Carp, a licensed optometrist practicing under various assumed names, including Lee Optical, Luck Optical, One Price Optical, Douglas Optical, Plains Optical, Mesa Optical, Mast Optical; and S. J. Rogers and N. Jay Rogers, licensed optometrists practicing under the assumed name of Texas State Optical.

Relators seek the extraordinary writ to require Judge Blankenship to set aside his order declaring a mistrial in Cause No. 69,448-E, pending in the 101st Judicial District Court of Dallas County, styled Ellis Carp et al. v. Texas State Board of Examiners in Optometry, and further commanding Judge Blankenship to enter a final and appealable judgment determining the validity or invalidity of the Professional Responsibility Rule adopted by the Board and under attack in the suit.

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[1] Drs. Carl R. Cathey, Robert E. Day, John E. Finn, B. R. Friedman, Harvey McCord, M. D. Monaghan, Don Montgomery, John S. Morgan, Frank V. Swanson, Jr., Bruno Theis, O. Reynolds Young, all of Dallas County; and Thomas G. Beall, Collin County; S. C. Scarbrough, Kaufman County; and E. U. Sprinkle, Hunt County.

The Board is an administrative agency of the State of Texas created under the provisions of Article 4553, Revised Civil Statutes of Texas, 1925. It is authorized by Article 4556 "to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry, and the enforcement of the Optometry Act." On December 21, 1959, the Board adopted what is entitled the Professional Responsibility Rule, the relevant provisions of which are quoted in the footnote.[2] Respondents

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[2] "In order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship, the following rule is hereby adopted by the Texas State Board of Examiners in Optometry on the 21 day of December, 1959

"Section 1. No optometrist shall:

"a. Divide, share, split, or allocate, either directly or indirectly, any fee for optometric services or materials with any lay person, firm or corporation, provided that this rule shall not be interpreted to prevent an optometrist from paying an employee in the regular course of employment, and provided further that it shall not be construed as a violation of this rule for any optometrist to lease space from an establishment on a percentage or gross receipts basis or to sell, transfer or assign accounts receivable.

"b. Divide, share, split or allocate either directly or indirectly, any fee for optometric services or materials with another optometrist or with a physician except upon a division of service or responsibility and then only after the patient paying the fee has full knowledge thereof, provided that this rule shall not be interpreted to prevent partnerships for the practice of optometry.

"c. Practice or continue, after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice

Carp and Rogers immediately attacked the Rule by suit in the nature of a declaratory judgment action, since which time the Board has been under successively issued court orders restraining the enforcement of the Rule.

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in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one (1) year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Article 4563, as amended, Revised Civil Statutes of Texas, whichever period shall be the longer.

"*d.* Use, cause or allow to be used after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, his name or professional identification, as authorized by Article 4590e, as amended, Revised Civil Statutes of Texas, on or about the door, window, wall, directory, or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

"*e.* Practice or continue, after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

"*f.* The requirement of subparagraphs *d* and *e* above that an optometrist be 'actually present' in an office, location or place of practice holding his name out to the public shall

It is necessary to describe only briefly the various proceedings and legal maneuvers of the parties preliminary to the events in court which brought about this mandamus proceeding. The suit attacking the Rule was placed on the jury docket upon the motion of Respondents Carp and Rogers. A pre-trial hearing was held on September 12, 1963, at which the Respondent Judge Blankenship overruled the motion of the Board to strike the cause from the

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be deemed satisfied if the optometrist is, as to such office, location or place of practice, either:

"(1) physically present therein more than half the total number of hours such office, location, or place of practice is open to the public for the practice of optometry during each calendar month for at least nine months in each calendar year; or

"(2) physically present in such office, location, or place of practice for at least one-half of the time such person conducts, directs, or supervises any practice of optometry. Provided that this rule shall not be interpreted as requiring the physical presence of a person who is ill, injured, or otherwise incapacitated temporarily:

The requirement of subparagraphs *d* and *e* above that an optometrist be 'practicing optometry' at an office, location, or place of practice holding his name out to the public shall be deemed satisfied if the optometrist regularly makes personal examination at such office, location or place of practice of the eyes of some of the persons prescribed for therein or regularly supervises or directs in person at such office, location or place of practice such examinations.

"Section 2. The willful or repeated failure or refusal of an optometrist to comply with any of the provisions of Section 1 above shall be considered by the Texas State Board of Examiners in Optometry to constitute prima facie evidence that such optometrist is guilty of violation of Chapter 10, Title 71, as amended, of the Revised Civil Statutes of Texas, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instance or instances in which it is alleged that the rule was not complied with. Alternatively, or in addition to the above, it shall be the duty of the Board to institute and prosecute an action in a court of competent jurisdiction to restrain or enjoining the violation of any of the preceding rules."

jury docket and that the case proceed to trial before the court with the issues to be determined as matters of law under the substantial evidence rule. Parenthetically, it may be noted that at all proper times in the course of the subsequent trial the Board reasserted this position by proper motions, all of which were in turn overruled.

Trial commenced on October 21, 1963, and continued until November 13, 1963. The court submitted twelve special issues to the jury inquiring, in brief, if the members of the Texas Optometric Association, Inc. entered into a conspiracy with a majority of the members of the Board to use powers of the Board to prohibit the practice of optometry under trade or assumed names and multiple offices; if enforcement of the Professional Responsibility Rule resulted in the stifling of competition in the practice of optometry; if the persons conspiring, if such were found, did so for the purpose of stifling competition in the practice of optometry between Relators and Respondents; if enforcement of the Professional Responsibility Rule would increase the cost of spectacles; if the persons conspiring, if such were found, did so for the purpose of increasing the cost of spectacles; if the Relator Board acted arbitrarily in adopting the Rule; if enforcement of the Rule will lessen competition; if the Rule was necessary in the regulation of the practice of optometry by the Board; if the Board was not acting in good faith for the purpose of regulating the practice of optometry in adopting the Rule; if there were no reasonable relationship to the protection of the public health and welfare of the citizens of Texas; and if in the adoption of the Rule the Board followed the procedure set out in its "rule-making procedure rule."

After lengthy deliberation the jury announced in open court that it was unable to agree on answers to any of the issues. The jury was discharged on November 13, 1963,

and on November 14, 1963, the Relators filed a motion for the court to proceed to judgment and to the entry of judgment. On May 25, 1964, Judge Blankenship overruled this motion of Relators and declared a mistrial. This mandamus proceeding resulted.

Respondents present two points. They are, first, that "The writ should be denied because of the failure of the Relators to seek substantially the same relief in the Court of Civil Appeals."; and, second, "Granting the validity of the Rule is to be determined as a question of law, the Trial Court has authority to determine from a preponderance of the evidence the issue of conspiracy in restraint of trade."

Respondents Carp and Rogers variously assert they "injected a fact issue of 'conspiracy' in the declaratory judgment proceeding, and in so doing raised the issue that acts of an official not lawfully authorized are not acts of the State."; that "the Rule was not adopted in good faith for the purpose of protecting the public health and well-being, but upon the contrary as a result of a conspiracy between the individual Board members (who were also members of Texas Optometric Association) and the other members of TOA for the purpose of destroying competition then being experienced by such conspirators."; "that the rule was the product of the conspiracy, and was therefore invalid."

The allegations of these Respondents upon which the foregoing rest are copied in the footnote.[3]

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[3] "Your Plaintiffs now allege that said 'Professional Responsibility Rule' was not adopted in good faith by the said Defendant Board for the purpose of protecting the health and well-being of the citizens of the State of Texas, but, on the contrary, was adopted by the Defendant Board (your Plaintiff, N. Jay Rogers, dissenting therefrom) for the avowed purpose of injuring your Plaintiffs and

The issue in the suit in the district court is the validity of the Professional Responsibility Rule promulgated by the Board. The issues in this mandamus proceeding are whether the determination of such issue in the district court presents only questions of law, and, if so, whether this Court should direct the district court—Respondent Judge Blankenship—to proceed to judgment, either sustaining or invalidating the Rule upon the basis of the trial record made before him.

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all other optometrists similarly situated in the State of Texas by so limiting and reducing, if not destroying, the practice of your Plaintiffs as competitors of the members of the Texas Optometric Association, Inc., of which all but one of the members of the said Board is also a member. In this connection your Plaintiffs now allege that said 'Professional Responsibility Rule' was not adopted in good faith for the purpose of regulating the practice of optometry, but for the sole and avowed purpose of destroying competition between the individual members of the said Board and those whom they represent as members of the Texas Optometric Association, Inc., and your Plaintiffs and other licensed optometrists similarly situated.

"Plaintiffs further show unto the Court that the said Board, and the individual members thereof, save and except N. Jay Rogers, have in the past been guilty of participating in fictitious and collusive lawsuits wherein said Board would undertake to co-operate with a willing plaintiff in an ostensible test of the rules promulgated by the said Board, and plaintiffs now show unto the Court that the Defendants, their agents, servants, attorneys and employees, have filed numerous lawsuits in connection with the rules heretofore promulgated by the Board, which such suits were to all intents and purposes fictitious in that same were not arms-length litigation in which the validity of such rules in controversy were bona fide and legitimately debated and argued before the respective Courts; that such Defendants have conspired in the filing of such suits with fellow members of the said Texas Optometric Association, Inc., to bring such suits against the Board; and the same have been tried upon agreed Statements of Fact prepared by the attorney for the Board, and with both parties desiring a favorable ruling on the validity of the respective rules involved, thus circumventing a full and open hearing on such matters between parties bona fide contesting the power and authority of the Texas State Board of Examiners in Optometry so to enact such rules; that such actions on the part of the Defendants effectively prevent Plaintiffs and others

It was recognized long ago that in reviewing acts of administrative agencies the courts are not to investigate the methods they adopt or the motives or purposes which prompt their action. Railroad Commission of Texas v. Galveston Chamber of Commerce, 105 Tex. 101, 145 S.W. 573, 580 (1912). The legal effect of the administrative act upon the parties affected is the judicial inquiry. Railroad Commission of Texas v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W.2d 967 (1937). Where, as here, the administrative action is quasi-legislative in nature, and apart from

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similarly situated from appearing and contesting such action on the part of the Defendants and effectively deprive Intervenors of their day in Court and the protection of their property rights and, consequently and by virtue of such acts, does not constitute due process of law and is in violation of Plaintiffs' constitutional rights, in that such controlled litigation is unknown to them until same reaches the Appellate Courts of this State on a Record and Statement of Facts which have been agreed upon between the co-conspirators; And, by reason of the foregoing facts alleged under oath, the District Court of Dallas County, Texas, in the exercise of its equity power and jurisdiction has temporarily restrained and enjoined said Defendants from so conspiring in the future.

"Plaintiffs now allege that it was the avowed purpose of the individuals composing the Texas State Board of Examiners in Optometry (exclusive of your petitioner N. Jay Rogers, who voted against the adoption of the 'Professional Responsibility Rule'), to adopt the same so as to eliminate competition which the members of the Texas Optometric Association, Inc., and the said individuals composing said Board, individually and not as officials, were experiencing in their practice; that said rule was not promulgated in good faith for the purpose of protecting the public (for it does not accomplish such purpose) but was adopted with the ulterior and invidious motive of using their public office for private gain through the destruction of their competition.

"Your Plaintiffs now allege that the adoption of the 'Professional Responsibility Rule' was done by a majority of said Board after it had been pointed out to said Board that the effect of the adoption of such rule would be tantamount to the destruction of the practice of your Plaintiffs; Nevertheless, the said individual board members, purporting to act in their official capacity, but motivated solely by their own selfish interests and the selfish interests and desires of the Texas Optometric Association, Inc., proceeded with the adoption thereof."

the question of corruption in its inception, its review by the judiciary is constitutionally limited to a determination of questions of law, i.e., whether the action is within the powers delegated to the agency and, if so, whether the action is arbitrary, capricious or unreasonable because not reasonably supported by substantial evidence. Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957); Hawkins v. Texas Co., 146 Tex. 511, 209 S.W.2d 338 (1948); Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424 (1946); Thomas v. Stanolind Oil & Gas Co., 145 Tex. 270, 198 S.W.2d 420 (1946).

Respondents appear to acknowledge the foregoing by their statement in their Point No. 2 that "granting the validity of the Rule is to be determined as a question of law * * *." What Respondents seek to assert is an additional type of attack against the order here, namely, that it is the product of a conspiracy in restraint of trade as to which there are fact questions to be decided by the preponderance of evidence standard. This Court in Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957), in which three similar rules of general application promulgated by the Optometry Board were likewise under attack, recognized that broad regulatory powers, many of which are discretionary in nature, are delegated to the Board.* We said of that controversy:

> "It is not inaccurate to describe this as a dispute between two groups of optometrists, one of which emphasizes the merchandising factor of the profession or occupation and contends that the cost of suitable glasses for the using public may be greatly reduced by

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*Respondent Carp intervened in Kee v. Baber attacking the rules there considered on the basis of similar allegations of conspiracy; however, the issue drawn thereby was put aside by stipulations of the parties.

eliminating numerous unnecessary steps and practices which are insisted upon by the opposing group who regard such procedures and regulations as necessary to safeguard the public health. To our minds this basic conflict in Texas has been resolved by the Legislature and the optometrists themselves in favor of the group favoring strict regulation essentially by the profession itself."

We also said:

"Optometry has been classified by the Legislature as a profession and as such subject to a degree of self-regulation. As is the case of most professions, a certain proportion, generally a majority group, in a sense do tell the other members of the profession 'how to run their business.' This is a necessary adjunct or burden of regulation which the Legislature has deemed necessary to prescribe in order to safeguard the public health and welfare."

That a similar professional dispute is here involved is evident from the allegations of Respondents Carp and Rogers in their suit attacking the Professional Responsibility Rule.[5] Article 4553 requires that members of the

[5] "Plaintiffs allege that there are several hundred optometrists practicing in the State of Texas and that through the years said optometrists have generally divided themselves into two groups, although each member of both groups is duly licensed to practice under the laws of the State of Texas. One of said groups is composed of those persons who have banded themselves together under the name of 'Texas Optometric Association, Inc.,' a corporation. The members of said corporate association are generally single practitioners who do not practice under a trade or assumed name and who ordinarily do not operate more than one optometric establishment. This group, acting through its corporate association, as aforesaid, had generally assumed to speak for all of the optometrists licensed to practice in the State of Texas, whether members or non-

Board "shall possess the necessary qualifications to practice optometry." Those appointed to serve on the Board, as is true of all administrative agencies, necessarily bring their individual professional viewpoints with them. These may or may not be shared by either a majority of the Board, or by a majority of the profession itself. But the members of the Board having the same professional objectives will necessarily join together in acting upon rules

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members of said association. On the other hand, there is a large group of licensed optometrists who have adopted a different approach to the practice of optometry and engage in the practice thereof under trade or assumed names and in multiple offices or establishments. During the past decade there has been a great deal of litigation within the State of Texas between members of the two opposed groups (all parties hereby being thoroughly and completely familiar with each specific piece of litigation), and the practitioners who belong to the 'Texas Optometric Association, Inc.,' have been successful, generally, in procuring the appointment to the Defendant Board of a majority of persons who are members of said 'Association' and who have endeavored by reason of their official position to accomplish the ultimate objects of said private association. Throughout the years said 'Association' has, through the agency of the Board, constantly sought to adopt rules or procure passage of legislation which would prevent the practice of optometry under trade or assumed names or in multiple establishments. Being unsuccessful in procuring the passage of legislation, said members of said 'Association' who have become members of the Defendant Board have, under the guise of the adoption of official rules and regulations, including the 'Professional Responsibility Rule,' attempted to outlaw the practice of optometry under trade or assumed names and in multiple establishments, notwithstanding the fact that such is and was and will continue to be, until the Legislature acts to the contrary, a lawful method and means of practice. As an example of the activities of the said Board, acting ostensibly as the Texas State Board of Examiners in Optometry, but in truth and in fact as a tool and agency of the Texas Optometric Association, Inc., purported to adopt on or about December 21, 1959, the so-called 'Professional Responsibility Rule,' purporting to govern the practice of optometry in the State of Texas. Your Plaintiffs attach hereto and incorporate herein by reference said Rule, as fully as if set out herein in haec verba, but in so doing your Plaintiffs do not admit the validity of said 'Professional Responsibility Rule' or any part thereof."

and regulations to govern the profession, and those in the majority will prevail. The views thereby translated into governing regulations will coincide with the views of others, and perhaps a majority, of the profession. But this is not unlawful conspiracy; it is neither unlawful in itself nor is it the accomplishment of a lawful objective by unlawful means. Cf. State v. Standard Oil Co., 130 Tex. 313, 107 S.W.2d 550 (1937). The invalidation of an administrative order apart from, and regardless of, its validity as a matter of law when measured by the standard of the substantial evidence rule requires a showing of circumstances under which it would be shocking to the judicial conscience to permit the order to stand. This requires, in turn, a showing of conditions comparable in seriousness to corruption, fraud, dishonesty or bribery in the promulgation of the administrative order. This is not alleged here, and there is no contention that such is shown by the evidence in the trial of the case. It is in the public interest that orders of administrative agencies shall not stand when they are the product of sinister acts and deeds which shock the judicial conscience. But fearless administration is also in the public interest, and this is strengthened when administrative agencies are given protection against harassment or intimidation by suits which do not meet the test we have indicated.[g]

The issues submitted to the jury in this case, previously reviewed in the forepart of this opinion, illustrate the fore-

g. An affirmative answer to all of the issues would not

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[g] Compare the reasoning supporting the rule of federal and state jurisdictions that public officials are immune from tort liability even when it is alleged that they acted maliciously, See Sanders State Bank v. Hawkins, 142 S.W. 94 (Tex. Civ. App. 1911); Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896); Gregoire v. Biddle, 177 F.2d 579 (2nd Cir. 1949); Davis, Administrative Law Treatise, Ch. 26, §§ 26.01 et seq.

afford a basis for its invalidation, assuming the validity of the Rule when subjected to the substantial evidence standard. If the Rule was enacted within the powers vested in the Board by the Legislature, and if reasonably supported by substantial evidence, there can be no unlawful conspiracy in the fact, if it be a fact, that a majority of the Relator Board joined in promulgating the Rule, and in using the powers of the Board to prohibit the practice of optometry under trade or assumed names and by means of multiple offices. Nor is the Rule rendered unlawful because it will lessen competition and increase the cost of spectacles. The Board cannot have acted arbitrarily if it acted within its powers and if its action is reasonably supported by substantial evidence. Its motives are not the subject of judicial inquiry. The question of whether or not there is a reasonable relationship in the promulgation of the Rule to the protection of the public health and welfare of the citizens of Texas is one of law, i. e., whether or not the Board exceeded its statutory powers in promulgating the Rule.

This charts the proper trial course of the suit to which this proceeding relates. The attack by Respondents Carp and Rogers upon the Professional Responsibility Rule involved only questions of law. Article 1734, Vernon's Annotated Texas Statutes, authorizes this Court to issue the writ of mandamus " * * * to compel a judge of the district court to proceed to trial and judgment in a cause agreeably to the principles and usages of law * * * " In point by analogy are the decisions that the writ of mandamus is available to compel the rendition of a judgment by the trial court upon a special issue verdict, as well as a general verdict. Lloyd v. Brinck, 35 Tex. 1 (1872); Gulf, C. & S. F. Ry. Co. v. Canty, 115 Tex. 537, 285 S.W. 296 (1926); Cortimeglia v. Davis, 116 Tex. 412, 292 S.W. 875 (1927); South-

land Greyhound Lines, Inc. v. Richardson, 126 Tex. 118, 86 S.W.2d 731 (1935). In these cases the action taken by the trial court involved a determination of whether there was conflict in the findings of the jury with respect to any fact essential to the rendition of a final judgment. This determination was not regarded as an exercise of a judicial function by the trial court such as would defeat the writ of mandamus. It was stated in Cortimeglia and reiterated in Southland Greyhound Lines, Inc.:

> "'The judge of the court, however, has no arbitrary right to refuse to enter judgment on a verdict which constitutes a finding on all the facts tendered in the pleadings necessary to the rendition of judgment. And, when it appears from the verdict itself and the order refusing to render and enter judgment thereon that such refusal is arbitrary and not based on the exercise of discretion, mandamus will lie to require entry of judgment. In such case the action of the judge is in effect a refusal to proceed to judgment in the trial of the cause.'"

So it is here. The case has been fully developed in the trial court and is ripe for judgment. The trial judge was mistaken in his belief that answers by the jury to the special issues which he submitted were essential to a rendition of judgment, just as in an occasional case a trial judge may be mistaken in his belief that there is conflict in the jury findings. In such instances a judgment should be rendered, and such action may be compelled by mandamus. The writ in no way controls the judicial discretion of the Respondent judge. It does not direct that he enter a particular judgment for a certain party but only that he proceed to judg-

ment.[1] The circumstance that the jurisdiction of the Court of Civil Appeals was not first invoked does not defeat the jurisdiction of this Court. State v. Ferguson, 133 Tex. 60, 125 S.W.2d 272 (1939); Hidalgo County Water Improvement District No. 2 v. Blalock, 157 Tex. 206, 301 S.W.2d 593 (1957); See also Yett v. Cook, 115 Tex. 175, 268 S.W. 715 (1925).

We express no opinion by inference or otherwise upon the question of whether the action of the Board in promulgating the Professional Responsibility Rule was beyond the powers delegated to the Relator Board or was arbitrary, capricious or unreasonable because not reasonably supported by substantial evidence. These are questions of law to be initially determined by the Respondent trial judge and are not before us in this mandamus proceeding.

We are confident that the Respondent trial judge will proceed in accordance with this opinion without the necessity for an actual issuance of the writ of mandamus.

SMITH, J., dissenting.

POPE, J., not sitting.

SMITH, Justice (dissenting).

I respectfully dissent. The Court has, in effect, held that the Respondents failed to plead in the trial court facts sufficient to show that the individual members of the Board entered into a conspiracy for the purpose of destroying competition between the individual members of the Board

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[1] Compare the cases where the entry of judgment on the pleadings or upon a motion for instructed verdict is sought to be compelled. Yantis v. McCallum, 121 S.W.2d 610 (Tex. Civ. App. 1938, original proceeding); American Bottling Company v. Briggs, 232 S.W.2d 103 (Tex. Civ. App. 1950, original proceeding).

and those whom they represent as members of the Texas Optometric Association and the Respondents. My position, simply stated, is this: If the pleadings alleged, and there was some evidence to support an allegation that the Professional Responsibility Rule under attack was not enacted in good faith for the purpose of protecting the public health and well-being, but was the result of an actionable conspiracy entered into between the individual members of the Texas State Board of Examiners in Optometry, or if such issue or issues were tried by consent, the trial judge's action in submitting the issues of conspiracy to a jury for determination was in the exercise of his judicial discretion, and this Court is without authority, in mandamus proceedings, to control the exercise of such discretion.

This is not a proceeding brought solely to test the validity of the rule, but the question is whether the pleadings and the evidence raise issues of fact to be submitted to the trier of the facts in a trial de novo, to be determined by a preponderance of the evidence rather than the substantial evidence rule. In this connection, it should be stressed that the validity or invalidity of the rule is not before this Court.

In my opinion the legal effect of the pleadings was to charge that the individual members of the Board had entered into a conspiracy, which is an actionable conspiracy under the anti-trust laws of the State. These acts, if committed, were unlawful acts of officials, hence not acts of the State. Therefore, the issue was properly tried under the preponderance of the evidence rule. See Cobb v. Harrington, 144 Tex. 360, 190 S.W.2d 709, 172 A.L.R. 837 (1945).

In discussing or relating the allegations of fact contained in the pleadings of both the Relators and the Re-

spondents, I wish to make it clear that my comments are in no way to be construed as an expression of an opinion as to how the trier of the fact issues, whether raised by the pleadings and the evidence or tried by consent, should answer the issues.

The pleadings are voluminous and the statement of facts consists of some three thousand pages. I have read the pleadings but not the statement of facts, therefore, I do not propose to second guess the trial court as to the evidence but rather choose to think that it was the considered opinion of the trial court that the evidence which had been adduced before the court and jury in a regular trial was sufficient to raise an issue of fact on the question of conspiracy.

The Court does not reach the question of evaluation of evidence, but holds that the pleadings fail to allege an unlawful conspiracy and that the acts charged against the individual members of the Board were neither unlawful in themselves nor did such alleged acts bring about the accomplishment of a lawful objective by unlawful means. The allegations in Respondents' pleadings show a studied design on the part of the members of the Board (except Rogers) to pass a rule (the rule under attack), which exceeded statutory authority and would ultimately destroy the business of their competitors. Furthermore, it was alleged that these Board members were also members of the Texas Optometric Association, an organization with a philosophy diametrically opposed to the business methods successfully and lawfully used by the Respondents in the operation of their profession as optometrists. It was alleged that by virtue of the conspiracy, the Board members had, in effect, abdicated their official positions and were acting for their own personal gain and that of their fellow

conspirators, the Texas Optometric Association. It was alleged that the Board members (except Rogers) paved the way for such accomplishment by the adoption of another rule known as the "Rule Making Procedure Rule."[1] The petition alleges that the "Rule Making Procedure Rule" was implicitly followed in the adoption of the "Professional Responsibility Rule," and that both rules were unlawfully promulgated for the "sole purpose of hindering and destroying the competition which said Board members, in their individual capacities, and members of the Texas Optometric Association, Inc., may encounter in their personal and day to day activities in their practice of optometry."

The pleadings further alleged that the effect of the rule, which they claim was adopted to destroy competition, would

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[1] "RULE MAKING PROCEDURE. In making rules and regulations for the regulation of the practice of optometry pursuant to Article 4556, Revised Civil Statutes of Texas, the Board shall prepare and propose such rules and regulations and submit by mail a copy of each such rule and regulation, as well as all other such rules and regulations as may have been proposed and filed with the board, supported by a petition signed by at least twenty-five per cent (25%) of the optometrists licensed by and practicing in the State of Texas, in ballot form to each optometrist licensed by and practicing in the State of Texas for a vote thereon. At the end of thirty (30) days from the time such ballots are mailed, the board shall count the ballots that have been returned; provided that no election shall be valid unless a minimum of fifty-one per cent (51%) of the optometrists licensed by and practicing in the State of Texas shall have voted at the election at which such rule or rules are voted on; and each and all of such rules and regulations that have received two-thirds of the votes cast shall be by said board declared as approved (page 67) by the profession. The fact that any rule or regulation is approved by the profession itself shall be considered by the board as prima facie evidence that such rule or regulation is reasonable and necessary for the regulation of the practice of optometry in Texas. No rule or regulation for the regulation of the practice of optometry shall be made by said board that has not received two-thirds of the votes cast in the manner above provided."

"be tantamount to the destruction of the practice of your Plaintiffs; nevertheless, the said individual Board members, purporting to act in their official capacity, but motivated solely by their own selfish interests and the selfish interests and desires of the Texas Optometric Association, Inc., proceeded with the adoption thereof."

The trial court defined, in its charge to the jury, civil conspiracy in these words:

> "You are further instructed that a civil conspiracy is a combination of two or more private persons, firms or associations by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means."

This is a correct definition and one that has been approved by the courts. See Bartelt v. Lehmann, Tex.Civ.App. (1947), 207 S.W.2d 131, 132, wr. ref.

Pursuant to Article I, Section 26, of the Constitution of Texas, our Legislature adopted Article 7429, Vernon's Annotated Civil Statutes, which reads:

> "Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal."

It is not in accord with the Constitution of Texas and the laws of Texas to condone the selfish acts of one group of a certain profession which would lead to the destruction of the practice and the elimination of the competition of another group engaged in the same profession.

The Court says that in Kee v. Baber, 157 Tex. 387, 303 S.W.2d 376 (1957), this Court recognized that "* * * broad regulatory powers, many of which are somewhat discretionary in nature, are delegated to the * * * Board * * *."

The Court, however, overlooks the statement in Kee v. Baber, which distinguishes that case from this. In Kee v. Baber, we said:

> "The gravamen of appellants' attack upon the three rules in question are that they are *inconsistent* with the provisions of Article 4563. We do not so regard them. The provisions of the legislative enactment are broad and general in scope. An intention to vest the Optometry Board with authority to fill in the details relating to the proscribed action by members of the profession is indicated. * * *"

Although the Court in the present case points out that Respondent Carp intervened in Kee v. Baber and attacked the rules there under consideration "on the basis of similar allegations of conspiracy," and that the issue of conspiracy was "put aside by stipulations of the parties," the Court now cites Kee v. Baber as authority for its holding that no conspiracy has been pleaded.

The Court dismisses the conspiracy charge in this case by observing that this is just a professional dispute and that a rule has been adopted which happens to please the members of the Board (except Rogers) and the members of the Texas Optometric Association, Inc., a corporation, its members allegedly having been unlawfully given the authority to finally, in effect, enact the rules for the Board to follow. The conspiracy charges are more serious than the Court seems to realize.

The trial court held the pleadings alleged a conspiracy in restraint of trade, and the trial court was of the opinion that there was *some* evidence showing that a conspiracy produced the rule in order to stifle competition in the sale of eyeglasses. Whether it was urged that there was no evi-

dence of conspiracy or whether the trial court was doubtful as to the sufficiency of the evidence to raise a fact issue is immaterial. The fact remains that the trial court, in the exercise of its discretion, overruled all objections offered by Relators and submitted issues inquiring if the *individual* members entered into a conspiracy with the Texas Optometric Association to use the powers of the Board to prohibit the practice of optometry under trade or assumed names; inquiring if the enforcement of the rule would "result in the stifling of competition in the practice of optometry between those same persons and your plaintiffs (Respondents)." The jury was asked to find if such conspiracy (fraud) was for the purpose of stifling competition.

In none of the cases cited by the Court which involved Railroad Commission orders were there pleadings that the individual members of the Railroad Commission had entered into a conspiracy with one group to stifle competition between that group and another group engaged in the same business. The Relators have failed to show a clear abuse of discretion by the trial court. They have failed to show a clear right to the writ of mandamus. Therefore, the application for the extraordinary writ of mandamus should be denied.

Clearly the objections to the pleadings, and the Relators' motion for instructed verdict presented questions which required the exercise of discretion by the trial judge. Mandamus will not lie to compel the performance of an act of a judge involving judicial discretion. State Board of Insurance v. Betts, 158 Tex. 83, 308 S.W.2d 846, 847 (1958); Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648, 85 A.L.R.2d 1 (1958). In Iley it was held that this court will not issue writs of mandamus to control or revise the exercise of dis-

cretion by trial courts in the performance of purely judicial as distinguished from ministerial acts.

In the Betts case, supra, it was said that this Court is not vested with general supervisory power over the district courts.

> "If an exercise of discretion by the district judge be involved this Court may not assert its original jurisdiction to enforce its own judgment, even though the actions of the district judge may have been improvident or otherwise erroneous."

The writ of mandamus will not lie to correct a merely erroneous or voidable order of the trial judge. The action of the trial judge in permitting the case to go to the jury, and later declaring a mistrial when a verdict was not obtained are not orders which the trial court was powerless to enter. If such actions were erroneous, such errors can be corrected on appeal. See Iley v. Hughes, supra.

I agree with the Respondents that the conspiracy question should be met. It is stated in their brief:

> "• • • [T]he Relators relegate the contention of Respondents to a challenge of 'motives' of the individual Board members. This exercise in semantics cannot sweep under the rug the hard fact that Respondents charged a conspiracy under the Constitution and statutes, offered proof in support thereof, and the belief of the trial judge that there was an issue of fact to submit to the jury. Conspiracy, to become an issue of law, must be determined from an evaluation of the facts offered in support thereof. Weighing the facts to determine the necessary quantum of evidence which would warrant submission to a jury is, and must always be, an exercise of judicial discretion."

The Court, in effect, has held that the pleadings must be sufficient to shock the judicial conscience, and that its conscience could only be shocked upon a "showing of conditions comparable in seriousness to that to corruption, fraud, dishonesty or bribery * * *." I cannot conceive of alleged conditions more corrupt in nature than the allegations that the members of the Board have lost sight of their duties as public officials, and have designedly conceived a scheme to destroy not only the good name of the Respondents but their business as well. The Court says this is not the type of action and conduct which would shock its conscience. Not only that, the Court holds that the "case has been fully developed in the trial court and is ripe for judgment." The effect of this order is to deprive the Respondents of the right to amend their pleadings and obtain a ruling on the amended pleadings by the trial court. The conspiracy issue has been eliminated. The Respondents can expect no relief by appealing from the force of the judgment the trial court has been ordered to enter. I presume it would not shock the conscience of the Court in the event the trial court should grant the Respondents a new trial in order to give the parties a fair opportunity to perfect a record from the trial court's ruling on sufficiency of pleadings after having been given an opportunity to amend their pleadings.

Relators' prayers for a writ of mandamus should be denied.

APPENDIX B

Judgment of the Supreme Court of Texas and Order Denying Rehearing

IN THE SUPREME COURT OF TEXAS

AUSTIN

February 8, 1967.

From Dallas County, Fifth District.

No. A-11478

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY et al.

vs.

ELLIS CARP et al.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Smith dissenting) that there was error in the judgment of the Court of Civil Appeals, but no error in that of the District Court, it is, therefore, adjudged, ordered and decreed that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the judgment of the District Court be, and hereby is, affirmed.

It is further ordered that respondents, Ellis Carp, S. J. Rogers and N. Jay Rogers, and their sureties, Ben Rogers

and Victor J. Rogers, pay all costs in this cause expended and incurred in this Court and Court of Civil Appeals; that petitioners, Texas State Board of Examiners in Optometry and the individual members thereof and the North Texas Optometric Society, Inc., have and recover of and from respondents, Ellis Carp, S. J. Rogers and N. Jay Rogers, and their sureties, Ben Rogers and Victor J. Rogers, the costs by them expended and incurred in said Courts, and that this decision be certified to the District Court of Dallas County, Texas, for observance.

IN THE SUPREME COURT OF TEXAS

AUSTIN

March 29, 1967.

From Dallas County, Fifth District.

No. A-11478

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY et al.

vs.

ELLIS CARP et al.

Respondents' motion for rehearing, filed in the above numbered and entitled cause on February 22, 1967, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX C

State Statute and Regulations Involved

1. Texas Revised Civil Statutes, Article 4556

The Board shall preserve a record of its proceedings in a book kept for that purpose. A record shall be kept showing the name, age, and present legal and mailing address of each applicant for examination, the name and location of the school of optometry from which he holds credentials, and the time devoted to the study and practice of optometry, together with such information as the Board may desire to record. Said record shall also show whether applicants were rejected or licensed and shall be prima facie evidence of all matters therein contained. The Secretary of the Board shall on or before March 1st of each year send a certified copy of said record to the Secretary of State for permanent record. A certified copy of said record with the hand and seal of the Secretary of said Board to the Secretary of State, shall be admitted as evidence in all courts. Every license and annual renewal certificate issued shall be numbered and recorded in a book kept by the Secretary of the Board. The Board shall have the power to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act. The Board shall have the power to appoint committees from its own membership, the duties of such committees shall be to consider such matters, pertaining to the enforcement of this Act and the regulations promulgated in accordance therewith, as shall be referred to said committees, and they shall make recommendations to the Board with re-

spect thereto. The Board shall have the power to employ the services of stenographers, inspectors, and other necessary assistants in carrying out the provisions of this Act. The Board shall be represented by the Attorney General and the County and District Attorneys of the State. The Board, any committee, or any member thereof, shall have the power to issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of books, records and documents to administer oaths and to take testimony concerning all matters within its or his jurisdiction. The Board shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain it. The Board shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this Act. Said action for an injunction shall be in addition to any other action, proceeding or remedy authorized by law. Before entering upon the discharge of the duties of his office, the Secretary-Treasurer of the Board shall give such bond for the performance of his duties as the Board may require, the premium of which is to be paid from funds in the possession of the Board. The Board shall adopt an official seal and license of suitable design and shall have an office where all of the permanent records shall be kept. Acts 1st C.S. 1921, p. 159; Acts 1939, 46th Leg. p. 360, § 3.

2. Professional Responsibility Rule

In order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship, the following rule is hereby

adopted by the Texas State Board of Examiners in Optometry on the 21st day of December, 1959, to become effective on the 21st day of December, 1959.

Section 1. No optometrist shall:

a. Divide, share, split, or allocate, either directly or indirectly, any fee for optometric services or materials with any lay person, firm or corporation, provided that this rule shall not be interpreted to prevent an optometrist from paying an employee in the regular course of employment, and provided further that it shall not be construed as a violation of this rule for any optometrist to lease space from an establishment on a percentage or gross receipts basis or to sell, transfer or assign accounts receivable.

b. Divide, share, split or allocate, either directly or indirectly, any fee for optometric services or materials with another optometrist or with a physician except upon a division of service or responsibility and then only after the patient paying the fee has full knowledge thereof, provided that this rule shall not be interpreted to prevent partnerships for the practice of optometry.

c. Practice or continue, after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names

of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one (1) year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Article 4563, as amended, *Revised Civil Statutes of Texas,* whichever period shall be the longer.

d. Use, cause or allow to be used after the elapsing of a reasonable time not to exceed one (1) year after the effective date of this rule, his name or professional identification, as authorized by Article 4590e, as amended, *Revised Civil Statutes of Texas,* on or about the door, window, wall, directory, or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

e. Practice or continue, after the elapsing of a reasonable time not to exceed one (1) year after the

effective date of this rule, to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

f. The requirement of subparagraphs *d* and *e* above that an optometrist be "actually present" in an office, location or place of practice holding his name out to the public shall be deemed satisfied if the optometrist is, as to such office, location or place of practice, either:

(1) physically present therein more than half the total number of hours such office, location, or place of practice is open to the public for the practice of optometry during each calendar month for at least nine months in each calendar year; or

(2) physically present in such office, location, or place of practice for at least one-half of the time such person conducts, directs, or supervises any practice of optometry.

Provided that this rule shall not be interpreted as requiring the physical presence of a person who is ill, injured, or otherwise incapacitated temporarily. The requirement of subparagraphs *d* and *e* above

that an optometrist be "practicing optometry" at an office, location, or place of practice holding his name out to the public shall be deemed satisfied if the optometrist regularly makes personal examination at such office, location, or place of practice of the eyes of some of the persons prescribed for therein or regularly supervises or directs in person at such office, location or place of practice such examinations.

Section 2. The willful or repeated failure or refusal of an optometrist to comply with any of the provisions of Section 1 above shall be considered by the Texas State Board of Examiners in Optometry to constitute prima facie evidence that such optometrist is guilty of violation of Chapter 10, Title 71, as amended, of the *Revised Civil Statutes of Texas,* and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instance or instances in which it is alleged that the rule was not complied with. Alternatively, or in addition to the above, it shall be the duty of the Board to institute and prosecute an action in a court of competent jurisdiction to restrain or enjoin the violation of any of the preceding rules.

Section 3. If any section, subsection, paragraph, subparagraph, sentence, clause, or part of the above provisions shall, for any reason, be held invalid, such decision shall not affect the remaining portions of the above provisions, and it is hereby declared to be the intention of the Texas State Board of Examiners in Optometry to have promulgated and adopted each section, subsection, paragraph, subparagraph, sentence, clause, or part of the above provisions irrespective of the fact that any other section,

subsection, paragraph, subparagraph, sentence, clause, or part of the above provisions may be declared invalid, that is, it is the intention of the said Board that each of the above provisions and portions thereof are severable.

Section 4. All rules, regulations, and administrative interpretations heretofore adopted by the Board are hereby repealed and rescinded insofar as such rules or interpretations, or any of them, or any provision thereof, is, or are inconsistent herewith.

3. Rule Making Procedure Rule

In making rules and regulations for the regulation of the practice of optometry pursuant to Article 4556, *Revised Civil Statutes of Texas,* the board shall prepare and propose such rules and regulations and submit by mail a copy of each such rule and regulation, as well as all other such rules and regulations as may have been proposed and filed with the board, supported by a petition signed by at least twenty-five per cent (25%) of the optometrists licensed by and practicing in the State of Texas, in ballot form to each optometrist licensed by and practicing in the State of Texas for a vote thereon. At the end of thirty (30) days from the time such ballots are mailed, the board shall count the ballots that have been returned, provided that no election shall be valid unless a minimum of fifty-one per cent (51%) of the optometrists licensed by and practicing in the State of Texas shall have voted at the election at which such rule or rules are voted on; and each and all of such rules and regulations that have received two-thirds of the votes cast shall be by said board declared as approved by the profession. The fact that any rule or regulation is approved by the profession itself shall be considered by the board

as prima facie evidence that such rule or regulation is reasonable and necessary for the regulation of the practice of optometry in Texas. No rule or regulation for the regulation of the practice of optometry shall be made by said board that has not received two-thirds of the votes cast in the manner above provided.

4. Advisory Committee Resolution

RESOLVED, that the board appoint a committee to be known as the Optometry Board Advisory Committee for the purpose of considering the regulation of the practice of optometry and recommending to the board what rules and regulations, if any, are necessary for the regulation of the practice of optometry in Texas; that in furtherance of this resolution and in order to appoint a committee representative of all geographical areas and all elements of the profession, the president of the board be, and he is hereby, directed to request each member of the Texas Legislature to recommend an optometrist from his district to serve on said committee.

Proof of Service

I, THURMAN ARNOLD, an attorney of record for Ellis Carp, et al., Appellants herein, certify that on the eleventh day of August, 1967, I served copies of the foregoing Jurisdictional Statement on the Appellees herein by depositing copies of the same in a United States mail box with first class postage prepaid, addressed to Ellis Lyons and Bennett Boskey, 918—16th Street, N.W., Washington, D.C., counsel for Appellees, and with air mail postage prepaid, addressed to Crawford Martin, Attorney General of Texas, Austin, Texas; John Reeves, Assistant Attorney General of Texas, Austin, Texas; Thomas Gee, Austin National Bank Building, Austin, Texas; Charles M. Babb, 1005 Capital National Bank Building, Austin, Texas; and Mark Martin, Fidelity Union Tower Building, Dallas, Texas, counsel for Appellees.

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THURMAN ARNOLD

INDEX

	Page
Statement	2
Argument	11
Conclusion	16
Appendix	1a

CITATIONS

CASES:

Currin v. *Wallace*, 306 U.S. 1 14
Eastern R.R. Conference v. *Noerr Motor Freight*, 365 U.S. 127 ..... 14, 15
Head v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424 ..... 11, 15
Kee v. *Baber*, 157 Tex. 387, 303 S.W. 2d 376 (1957) 8
Michell v. *Louisiana Board of Optometry Examiners*, 245 La. 1, 156 So. 2d 457, appeal dismissed for want of a substantial federal question, 377 U.S. 128 11
Parker v. *Brown*, 317 U.S. 341 ..... 14, 15
Roschen v. *Ward*, 279 U.S. 337 11
Safeway Stores v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334 15
Semler v. *Oregon State Dental Examiners*, 294 U.S. 608 11
Strauss v. *University of State of New York*, 2 N.Y. 2d 464; 161 N.Y.S. 2d 97, 141 N.E. 2d 595, appeal dismissed for want of a substantial federal question, 355 U.S. 394 11
Williamson v. *Lee Optical of Oklahoma*, 348 U.S. 483 11

STATUTES:

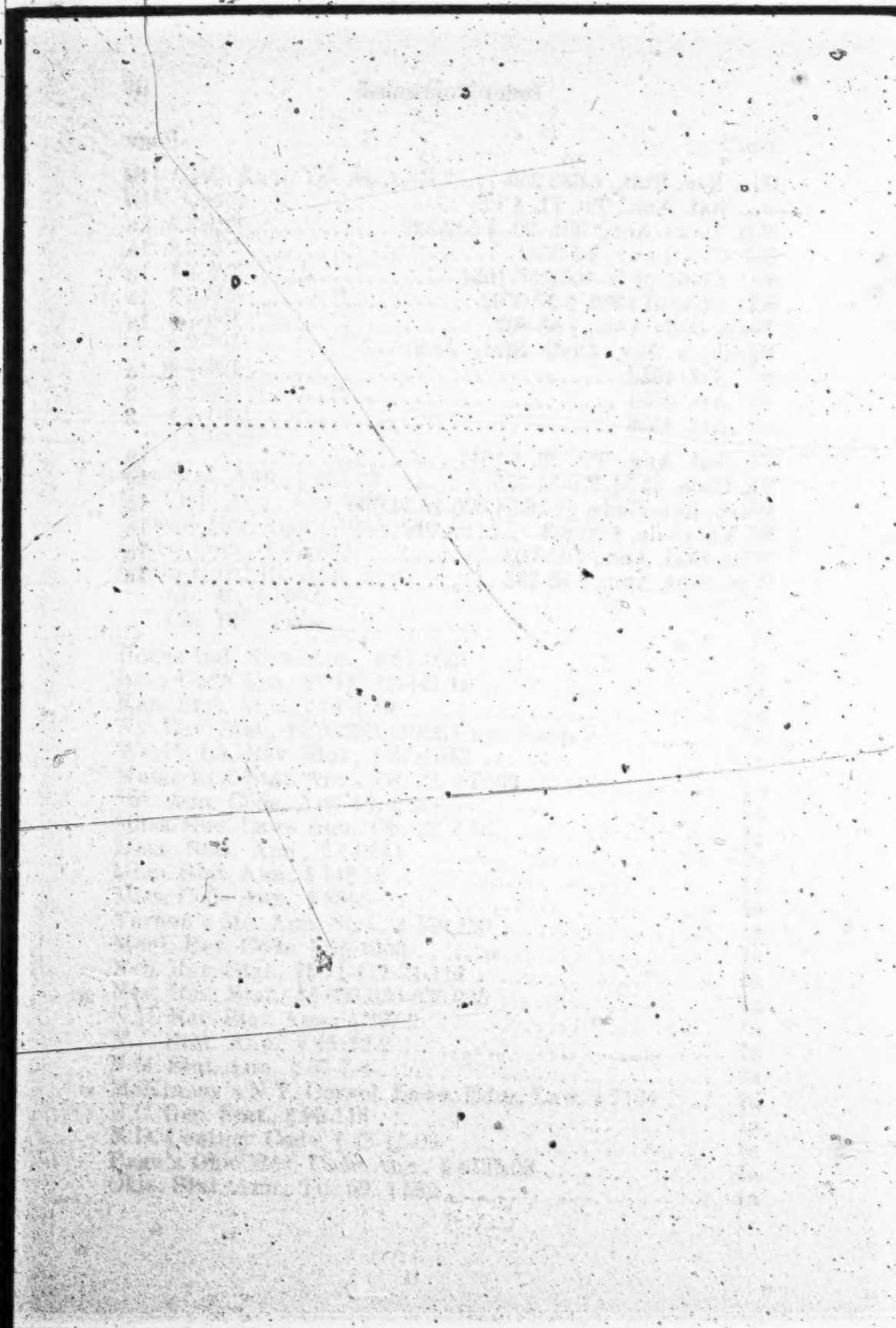
Ala. Code, Tit. 46, § 192 ..... 1a
Alaska Statutes, § 08.72.040 ..... 1a
Ariz. Rev. Stat., § 32-1702 ..... 1a
Ark. Stat. Ann., § 72-802 ..... 1a
West's Cal. Ann. Bus. & Prof. Code, §§ 3010-3011 ..... 1a
Col. Rev. Stat. 1963, § 102-1-6 ..... 1a
Conn. Gen. Stat., § 20-128 ..... 1a

	Page
Del. Code Ann., Tit. 24, § 2102	1a
D. C. Code:	
§ 2-109	2a
§ 2-301	2a
§ 2-402	2a
§ 2-503	1a
§ 2-607	2a
§ 2-701	2a
§ 2-801	2a
§ 2-903	2a
§ 2-1001	2a
§ 2-1002	2a
Fla. Stat. Ann., § 463.02	1a
Ga. Code Ann., § 84-1102	1a
Hawaii Rev. Laws 1955, Ch. 68, § 3	1a
Idaho Code, § 67-2907	1a
Smith-Hurd Ill. Ann. Stat.	
Ch. 91, § 105.6	1a
Ch. 127, § 60a	1a
Burns Ind. Stat. Ann., § 63-1001	1a
Iowa Code Ann., §§ 147.12-147.16	1a
Kan. Stat. Ann., § 74-1501	1a
Ky. Rev. Stat., § 320.230 (1966 Cum. Supp.)	1a
West's La. Rev. Stat., § 37:1042	1a
Maine Rev. Stat. Ann., Tit. 32, § 2502	1a
Md. Ann. Code, Art. 43, § 368	1a
Mass. Gen. Laws Ann., Ch. 13, § 16	1a
Mich. Stat. Ann., § 14.641	1a
Minn. Stat. Ann., § 148.52	1a
Miss. Code Ann., § 8835	1a
Vernon's Mo. Ann. Stat., § 336.130	1a
Mont. Rev. Code, § 66-1303	1a
Neb. Rev. Stat., §§ 71-111-71-114	1a
Nev. Rev. Stat., §§ 636.030-636.035	1a
N.H. Rev. Stat. Ann., § 327.2	1a
N.J. Stat. Ann., § 45:12-2	1a
N.M. Stat. Ann., § 67-7-4	1a
McKinney's N.Y. Consol. Laws, Educ. Law, § 7104	1a
N.C. Gen. Stat., § 90-116	1a
N.D. Century Code, § 43-13-03	1a
Page's Ohio Rev. Code Ann., § 4725.03	1a
Okla. Stat. Ann., Tit. 59, § 582	1a

Page

Ore. Rev. Stat., § 683.250 ..... 1a
Pa. Stat. Ann., Tit. 71, § 125 ..... 1a
P.R. Laws Ann., Tit. 20, § 532-533 ..... 1a
R.I. Gen. Laws, § 5-35-2 ..... 1a
S.C. Code, §§ 56-1053-56-1054 ..... 1a
S.D. Code of 1939, § 27.0702 ..... 1a
Tenn. Code Ann., § 63-803 ..... 1a
Vernon's Tex. Civil Stat. Ann.
Art. 4553 ..... 3, 1a
Art. 4554 3
Art. 4556 3

Vt. Stat. Ann., Tit. 26, § 1641 ..... 1a
Va. Code, §§ 54-370-54-375 ..... 1a
Wash. Rev. Code, §§ 18.54.020-18.54.030 ..... 1a
W. Va. Code, § 30-8-3 ..... 1a
Wisc. Stat. Ann., § 153.03 ..... 1a
Wyo. Stat. Ann., § 33-294 ..... 1a



IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 481

ELLIS CARP, ET AL., *Appellants*

v.

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY, ET AL.

On Appeal From the Supreme Court of the State of Texas

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, this motion to dismiss or affirm is filed on behalf of those members of the Texas State Board of Examiners in Optometry who were sued also in their individual capacities, and on behalf of the North Texas Optometric Society, Inc., and Don Montgomery, et al. (being individual optometrists).

The appeal presents no substantial federal question. The substantive regulation of the profession of op-

tometry which the Texas Supreme Court has here sustained is well within the framework of permissible state regulation which this Court has previously upheld in cases coming from other states. Appellants' attacks on the Texas Board's procedures not only are frivolous, but are based on gross distortion of the facts. Equally frivolous is appellants' claim of conflict with the federal antitrust laws—a claim which, moreover, was never presented in the courts below. Accordingly, plenary consideration of the case by this Court is not warranted.

STATEMENT

This appeal purports to challenge the validity, under the Federal Constitution, of the regulation by the State of Texas of certain aspects of the practice of the profession of optometry within that State. The particular regulation in issue is the Professional Responsibility Rule adopted by the Texas State Board of Examiners in Optometry on December 21, 1959, the validity of which has been sustained by the Supreme Court of Texas. In general, the rule prohibits the use of assumed or trade names by licensed optometrists in the practice of the profession of optometry in Texas; it prohibits fee-splitting by optometrists with lay persons and, in certain circumstances, with other optometrists; and it contains provisions which require and assure the presence of an optometrist at the offices at which he holds himself out as a practitioner.[1]

Inasmuch as appellants appear to base their constitutional questions on the manner in which the Board is constituted and on the procedures followed by the

[1] The Rule is reprinted in full at pages 66a-71a of the Jurisdictional Statement, hereinafter cited as "J.S.".

Board in adopting the regulation in question, it is appropriate that a fuller statement than that set forth in the Jurisdictional Statement be made.

The Texas State Board of Examiners in Optometry has been and is an official agency of the State of Texas. Created by statute in 1921, it is composed of six members who are appointed by the Governor and confirmed by the Texas Senate. The statute provides that "only optometrists licensed under the laws of Texas and actively engaged in the practice of optometry shall be eligible for appointment on said Board." Vernon's Texas Civil Statutes, Article 4554. Board members must have been residents of the State of Texas and must have engaged in the practice of optometry in Texas for at least five years immediately preceding their appointment, and must "qualify by taking the constitutional oath of office." Vernon's Texas Civil Statutes, Article 4553. Among the statutory powers delegated to the Board is the authority "to make such rules and regulations not inconsistent with this law [the Optometry Act] as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act." Vernon's Texas Civil Statutes, Article 4556. The Supreme Court of Texas in this case has held that the "Board did not exceed its statutory powers in promulgating" the Professional Responsibility Rule (J.S., p. 2a), that the rule was "grounded upon substantial evidence", and that "The necessity for such a rule was demonstrated by the general support it received from the members of the optometry profession and the professional societies and the record which abounds with evidence of the specific evils the rule was designed to correct" (J.S. p. 3a).

The Board adopted the Professional Responsibility Rule on December 21, 1959 after having conducted a series of meetings, investigations and hearings on the substance of the regulation during a period of over five years.

On September 4, 1954, the Board convened a special meeting to consider a lengthy petition filed with the Board and signed by 709 of the approximately 900 licensed optometrists in the State of Texas. In this petition, the optometrists made "known the consensus of our opinion as to the urgent necessity for the Board to adopt rules and regulations, for the regulation of the practice of optometry, embodying a standard of professional ethics and conduct on the same plane with the other learned professions". They stated that "We regard the practice of optometry as a profession and not simply as a trade or occupation . . . It should be governed by ethics and rules higher than those of the market place". The petition reviewed some of the evils existing within the profession of optometry in Texas, pointing out, among other things, that "Today in Texas the profession of optometry is being commercialized and exploited at the expense of the visual welfare of Texas citizens", that "Texas has become the promised land for unethical optometrists from the majority of American States, requiring high standards of professional conduct, which limit their opportunity to exploit the public and profession for personal profit", and that "Public trust and confidence, vital to any professional relationship, is being destroyed". The petition emphasized that "the State has a vital interest in the profession of optometry" and that "Experience in the healing art professions has demonstrated that the public interest is best served by re-

quiring practitioners to stand or fall on the genuine merit of their services rather than in allowing them to attract unsuspecting and uninformed patronage by publicity singing their own praises". The petition set forth a list of proposed minimum standards for the profession, and it urged the Board to "exercise the rule-making power delegated to it by the Texas Legislature to regulate the practice of optometry and to establish and enforce rules and regulations" which incorporated the minimum standards proposed (Defendants' Exh. 45, S.F. 2833).[2]

Among the proposed minimum standards were provisions substantially similar to those ultimately adopted by the Board more than five years later in the Professional Responsibility Rule. The minutes of the Board meeting of September 4, 1954 disclose that the Board proceeded to consider the proposed rules and that "after thorough consideration, the matter of the adoption of said rules was referred to the members for further study and consideration". (Defendants' Exh. 45, S.F. 2833). The matter was again considered at a special Board meeting the following day, September 5, but no final action was taken at that time (*ibid*). Thereafter, after further consideration at a special meeting held by the Board on September 18, 1954, the proposed rules were adopted, but then were withdrawn on October 11, 1954 while certain litigation was pending (S.F. 307-309).

On November 30, 1954, the Board received another petition signed by approximately 550 licensed Texas

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[2] "S.F." references are to the pages of the "Statement of Facts" (the transcript in the trial court). In connection with an Exhibit, the S.F. reference is to the page where the particular exhibit was admitted in evidence.

optometrists protesting the action of the Board in withdrawing the rules and regulations and requesting the Board once again to adopt the rules and regulations which had been withdrawn. Upon receipt of this petition, the Board gave notice to "all optometrists licensed by the State of Texas and to all other interested parties" of a public hearing to be held on January 3, 1955 to "consider such petition, hear such parties as desire to be heard and consider the making of rules, regulations and orders for the regulation of the practice of optometry not inconsistent with the laws of the State of Texas". A copy of the petition was attached to each notice, and the recipients were advised that "Licensed optometrists and all other interested parties may appear and be heard on this matter personally or by counsel, or both". The hearing was in fact held on January 3, 1955; the Board did not adjourn until all parties who desired to be heard were heard and it appeared that no person had anything further to present to the Board; the proceedings were recorded and transcribed; and the original transcript was made part of the minutes of the Board meeting and filed at the office of the Board (Defendants' Exh. 46, S.F. 2834).

Thereafter, at a Board meeting held on November 26-27, 1955, it was decided to send a letter (Defendants' Exh. 47, S.F. 2835) to all Texas optometrists informing them of the Board's "activities and efforts toward the regulation of optometry in Texas" since its January 3, 1955 meeting and hearing. The letter advised that two Board meetings had been held since January 3, 1955 and that, "having heard the proponents and opponents of the petition [filed with the Board] it is the unanimous opinion of the board that,

optometry being a profession which vitally affects the public health and welfare, there exists in Texas an urgent need for the regulation of the practice of optometry on an ethical basis and the vigorous enforcement of our optometry law". The letter advised further that it was the unanimous decision of the Board to proceed "at this time" with the consideration of three rules "as beginning steps in a long range program". Drafts of these three rules, known as the Basic Competence Rule, the Bait Advertising Rule and the Corporate Practice Rule, were enclosed in the letter to the optometrists, and each optometrist was requested to vote for or against the adoption of each proposal. The letter advised also that "If a rule is approved by a majority of the profession it will then be immediately submitted to the Attorney General for his official written opinion as to whether the approved rule is constitutional or unconstitutional. When the Attorney General's written advice is in hand it will be given due weight and consideration, and the board will proceed to take action on the rule". It should be noted that appellant Dr. N. Jay Rogers was a member of the Board and approved the foregoing procedure and action (*ibid*).

At a special Board meeting on April 8-9, 1956, the Board's Executive Director reported that the three proposed rules (Basic Competence, Price and Bait Advertising and Corporate Practice) had been approved by the optometric profession of Texas by votes of 555 to 56, 593 to 20 and 585 to 25 respectively. He reported further that, after receipt of a written opinion from the Attorney General of Texas, conferences were held with the Attorney General's office for the purpose of making certain changes "in wording and substance"

which "in the opinion of the Attorney General would have to be made in order to put the rules in proper shape for adoption". After further discussion and consideration of these rules, they were unanimously adopted by the Board, appellant Dr. N. Jay Rogers again being present and voting for their adoption (Defendants' Exh. 48, S.F. 2836). The validity of these three rules was thereafter upheld by the Supreme Court of Texas in *Kee* v. *Baber,* 157 Tex. 387, 303 S.W. 2d 376 (1957).

At its meeting on June 30 - July 3, 1957, the Board unanimously adopted its Rule Making Procedure Rule (appellant Dr. N. Jay Rogers being a member of the Board and voting in favor of the Rule).[8] This Rule, in substance, established as a regular practice the procedure which had been followed by the Board in the adoption of the three earlier Rules above referred up to, of canvassing the views of the optometric profession prior to the final promulgation of a regulation for the practice of optomery. It should be noted that the Rule Making Procedure Rule does not require the Board to promulgate any rule or regulation merely because it has been approved by the profession. Whether to do so or not still remains an official decision for the Board to make in its official capacity. In addition, the Board established at this meeting an Optometry Board Advisory Committee "for the purpose of considering the regulation of the practice of optometry and recommending to the board what rules and regulations, if any, are necessary for the regulation of the practice of optometry in Texas." Each member of the Texas legislature was requested to appoint an optometrist from his district to serve on the

[8] This Rule is reprinted in full at J.S., p. 71a.

Advisory Committee. Appellant Dr. N. Jay Rogers also voted in favor of the creation of the Advisory Committee. (Defendants' Exh. 49, S.F. 2837).

On January 27, 1958 the Optometry Board Advisory Committee made a report to the Board in which the Committee recommended, among other things, by a vote of 110 to 2, the adoption of additional regulations for the optometric profession substantially similar to the provisions of what became the Professional Responsibility Rule here in issue (S.F. 2800). These proposals were discussed at a Board meeting on February 24, 1958 (Defendants' Exh. 52, S.F. 2840) and again at a meeting on June 28, 1958 (Defendants' Exh. 54, S.F. 2842). At this latter meeting the Board adopted certain changes suggested by counsel, and the proposed rule was thereupon submitted to the Attorney General of Texas for "an official opinion as to its validity." After receipt of an official opinion from the Attorney General stating that the Professional Responsibility Rule would be valid, if adopted, the draft rule was mailed to "each of the 839 licensed optometrists practicing in Texas" in accordance with the Rule Making Procedure Rule (Defendants' Exh. 56, S.F. 2843).

Counsel for appellants were advised that the Board would consider the rule at a meeting on December 21, 1959 and were invited to appear and present any matters they desired in connection with the rule. Appellants and their counsel did attend the meeting, at which time it was reported that 542 optometrists had voted for adoption of the rule and that 31 had voted against. The Board minutes state that "Mr. Bergman, attorney for Dr. Carp, spoke at some length to the board in opposition to the adoption of the rule.

He was followed by Mr. Keith, attorney for Dr. Rogers, who also spoke at some length against adoption of the rule." Thereafter, "the board continued the discussion for some time", and finally the Rule was approved by the Board by a vote of 4 to 1 in order, as stated in the preamble of the Rule, "to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship" (Defendants' Exh. 56, S.F. 2843).[4]

On December 22, 1959, the day following the adoption of the Professional Responsibility Rule by the Board, appellants challenged the validity of the Rule in a suit in the 101st District Court of Dallas County, Texas (J.S., pp. 10-11). By a series of court orders and stays, the enforcement of the Rule was restrained (See J.S., p. 42a) during the lengthy period of this litigation. When the Supreme Court of Texas, after sustaining the validity of the Rule (J.S., pp. 1a-14a) and overruling a motion for rehearing (J.S., p. 64a), refused to stay its mandate beyond June 27, 1967, appellants applied to Mr. Justice Black for a stay pending disposition of this appeal. Mr. Justice Black denied the application on June 22, 1967, and on June 26, 1967 Mr. Justice White denied a request for reconsideration of that application.

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[4] In the light of the foregoing, it is difficult to understand appellants' statement on page 9 of the Jurisdictional Statement that at the December 21, 1959 meeting "the Board once again neither presented nor heard any evidence designed to show that the Rule's provisions were necessary or even reasonable." A footnote on the same page, however, and another on page 17, admit that appellants appeared at the hearing and argued against adoption of the rule, and there is no contention anywhere that the Board refused to hear any evidence of any kind that appellants desired to offer.

ARGUMENT

This appeal presents no substantial federal question warranting review by this Court.

1. It is settled that a state may, consistently with the Federal Constitution, impose upon the practice of the profession of optometry within the state the substantive regulation embodied in the Professional Responsibility Rule. The Rule "is a measure directly related to the protection of the public health" and "thus falls within the most traditional concept of what is compendiously known as the police power." *Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424, 428. The authority of the several states to regulate the practice of the health professions within their borders pursuant to the police power is beyond question (*Head* v. *New Mexico Board of Examiners in Optometry, supra; Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483; *Semler* v. *Oregon State Dental Examiners,* 294 U.S. 608; *Roschen* v. *Ward,* 279 U.S. 337), and appellants do not, and indeed cannot, contend that the Rule here involved is beyond the power of the State of Texas to impose. Nor does the Federal Constitution impose any barrier to the State's delegating to a state administrative agency the authority to prescribe detailed regulations of the profession of optometry. *Michell* v. *Louisiana Board of Optometry Examiners,* 245 La. 1, 156 So. 2d 457, appeal dismissed for want of a substantial federal question, 377 U.S. 128; *Strauss* v. *University of State of New York,* 2 N.Y. 2d 464, 161 N.Y.S. 2d 97, 141 N.E. 2d 595, appeal dismissed for want of a substantial federal question, 355 U.S. 394. Moreover, there is not, nor can there be, any question of the authority of the Board to promulgate the Rule involved in this case, for the

Supreme Court of Texas has held that the "Board did not exceed its statutory powers in promulgating the rule" (J.S., p. 2a) and that the Rule was "grounded upon substantial evidence" (J.S., p. 3a).

2. Appellants contend (J.S., pp. 13-20) that the procedures followed by the Board in adopting the Rule deprived them of their property without due process of law. This contention, even if it had been properly preserved by appellants in accordance with Texas procedural requirements, is so lacking in substance as to be frivolous.

The Texas State Board of Examiners in Optometry is not a private group of optometrists. It is a duly-constituted official agency of the State of Texas, established pursuant to Texas statute. Its members are appointed by the Governor of Texas, are confirmed by the Texas Senate, and qualify by taking the constitutional oath of office. The record in this case (see *supra*, pp. 4-10) discloses that the Professional Responsibility Rule was adopted by this duly-constituted official state Board after the most careful study and investigation and after a series of meetings and hearings extending over a period of more than five years. Every optometrists in the State of Texas and all other interested parties were afforded ample opportunity to be heard before the Board; appellants and their counsel did, in fact, appear before, and were heard by, the Board; the Rule was supported by the overwhelming majority of the optometric profession in Texas; the Attorney General of Texas, prior to the adoption of the Rule, had provided the Board with an official written opinion holding that it was valid; the Board, in promulgating the Rule, did so "In order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility,

and further safeguard the doctor-patient relationship;" and the Supreme Court of Texas found that "The necessity for such a rule was demonstrated by the general support it received from members of the optometry profession and the professional societies and the record which abounds with evidence of the specific evils the rule was designed to correct" (J.S., p. 3a).[5] There is no basis whatsoever for such incredible assertions as the appellants' assertions that the Rule "was established by private members of the optometry profession in Texas, rather than by any state body or agency officially concerned with the public interest" (J.S., pp. 13-14); or that "The Board of Examiners never exercised its judgment on whether the Rule was in the public interest" (J.S., p. 16); or that "No state official or body ever made or even pretended to make any determination that the Rule was in the public interest" (J.S., p. 17). Assertions such as these are frivolous and a sham.

3. Similarly, appellants' contention (J.S., pp. 20-27) that the Rule is void because it was adopted pursuant to a conspiracy to put them out of business is totally lacking in substance.

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[5] The Texas Court of Civil Appeals held the Rule invalid only because, in its view, "the Board in adopting it acted beyond the powers delegated by the Legislature" (J.S., p. 37a). This holding was, of course, reversed by the Supreme Court of Texas. But the Court of Civil Appeals expressly rejected all of the other contentions made by appellants. It held that the Board's action was "supported by substantial evidence" and that the contentions that the Rule was invalid "because it impairs the obligation of contracts, takes or destroys appellants' property without due process, bears no reasonable relationship to the health and well-being of the citizens of Texas, is retroactive in its legal effect and permits the Board to delegate unlawfully its rule making powers to outsiders (members of the profession of optometry)" were all without merit (J.S., p. 37a).

(a) The assertion that appellants were denied due process of law under the Federal Constitution because of the existence of a conspiracy is without merit (J.S., pp. 21-24). In Texas, as in most states,[6] the Board is required by statute to be composed of licensed optometrists. Appellants seem to be complaining that, somehow or other, a conspiracy exists because the majority of the members of the Board, after having conducted extensive investigation and having surveyed the views of the profession, reached a point of view very different from appellants' as to what constitutes the ethical practice of the profession. Certainly, the canvassing of the views of the optometric profession does not create a conspiracy. *Parker* v. *Brown,* 317 U.S. 341, 350-352; see *Currin* v. *Wallace,* 306 U.S. 1, 15-18; cf. *Eastern R.R. Conference* v. *Noerr Motor Freight,* 365 U.S. 127. The court below in the original mandamus proceeding in this case (see J.S., p. 11) aptly disposed of the contention as follows (J.S., pp. 49a-51a):

> Article 4553 requires that members of the Board "shall possess the necessary qualifications to practice optometry". Those appointed to serve on the Board, as is true of all administrative agencies, necessarily bring their individual professional viewpoints with them. These may or may not be shared by either a majority of the Board, or by a majority of the profession itself. But the members of the Board having the same professional objectives will necessarily join together in voting upon rules and regulations to govern the profession and those in the majority will prevail. The views thereby translated into governing regulations will coincide with the views of others, and

[6] See Appendix, *infra*, pp. 1a-2a.

perhaps a majority, of the profession. But this is not unlawful conspiracy; it is neither unlawful in itself, nor is it the accomplishment of a lawful objective by unlawful means. Cf. *State* v. *Standard Oil Co.*, 130 Tex. 313, 107 S.W. 2d, 550 (1937). The invalidation of an administrative order apart from, and regardless of, its validity as a matter of law when measured by the standard of the substantial evidence rule requires a showing of circumstances under which it would be shocking to the judicial conscience to permit the order to stand. This requires, in turn, a showing of conditions comparable in seriousness to corruption, fraud, dishonesty or bribery in the promulgation of the administrative order. *This is not alleged here, and there is no contention that such is shown by the evidence in the trial of the case.* (Italics supplied).

(b) Appellants' contention that the Professional Responsibility Rule constitutes a conspiracy in restraint of trade in conflict with the federal antitrust laws (J.S., pp. 24-26) was not raised or presented in, nor was it decided by, any of the courts below. The Jurisdictional Statement makes no reference to any point in this lengthy record where any conflict with the federal antitrust laws was asserted; indeed, there is not even any allegation in the pleadings, and no proof was adduced, that interstate commerce is in any way involved or affected. Cf. *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 427-429. The federal antitrust claim clearly cannot be raised here for the first time. *Safeway Stores* v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334, 342, n. 7. In any event, the contention is wholly without substance and frivolous. *Parker* v. *Brown*, 317 U.S. 341, 350-352; see also *Eastern R.R. Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 135 *et seq.*

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

Respectfully submitted,

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APPENDIX

The statutes of 46 states and the District of Columbia require that the members of the state optometry boards be state-licensed optometrists. Ala. Code, Tit. 46, § 192; Alaska Statutes, § 08.72.040; Ariz. Rev. Stat., § 32-1702; Ark. Stat. Ann., § 72-802; Col. Rev. Stat. 1963, § 102-1-6; Conn. Gen. Stat., § 20-128; Del. Code Ann., Tit. 24, § 2102; D.C. Code, § 2-503; Fla. Stat. Ann., § 463.02; Ga. Code Ann., § 84-1102; Hawaii Rev. Laws 1955, Ch. 68, § 3; Idaho Code, § 67-2907; Smith-Hurd Ill. Ann. Stat., Ch. 91, § 105.6; Ch. 127, § 60a; Burns Ind. Stat. Ann., § 63-1001; Iowa Code Ann., §§ 147.12–147.16; Kan. Stat. Ann., § 74-1501; Ky. Rev. Stat., § 320.230 (1966 Cum. Supp.); West's La. Rev. Stat., § 37:1042; Maine Rev. Stat. Ann., Tit. 32, § 2502; Mass. Gen. Laws Ann., Ch. 13, § 16; Mich. Stat. Ann., § 14.641; Minn. Stat. Ann., § 148.52; Miss. Code Ann., § 8835; Vernon's Mo. Ann. Stat., § 336.130; Mont. Rev. Code, § 66-1303; Neb. Rev. Stat., §§ 71-111–71-114; Nev. Rev. Stat., §§ 636.030–636.035; N.H. Rev. Stat. Ann., § 327.2; N.J. Stat. Ann., § 45:12-2; N.M. Stat. Ann., § 67-7-4; McKinney's N.Y. Consol. Laws, Educ. Law, § 7104; N.C. Gen. Stat., § 90-116; N.D. Century Code, § 43-13-03; Page's Ohio Rev. Code Ann., § 4725.03; Okla. Stat. Ann., Tit. 59, § 582; Ore. Rev. Stat., § 683.250; R.I. Gen. Laws, § 5-35-2; S.C. Code, §§ 56-1053–56-1054; S.D. Code of 1939, § 27.0702; Tenn. Code Ann., § 63-803; Vernon's Tex. Civil Stat. Ann., Art. 4553; Vt. Stat. Ann., Tit. 26, § 1641; Va. Code, §§ 54-370–54-375; Wash. Rev. Code, §§ 18.54.020–18.54.030; W.Va. Code, § 30-8-3; Wisc. Stat. Ann., § 153.03; Wyo. Stat. Ann., § 33-294.

In other states, the membership of such boards is composed of optometrists and one public official (Pa. Stat. Ann., Tit. 71, § 125), or optometrists and one "public member" (West's Cal. Ann. Bus. & Prof. Code, §§ 3010-3011), or optometrists and either one (P.R. Laws Ann., Tit. 20, §§ 532-533) or perhaps two physicians (Md. Ann. Code, Art. 43, § 368). Supervisory and examining boards for other

professions frequently are composed of members of the profession involved. See, for example, D.C. Code § 2-109 (Board of Examiners in Medicine and Osteopathy); § 2-301 (Board of Dental Examiners); § 2-402 (Registered Nurses Examining Board); § 2-607 (Board of Pharmacy); § 2-701 (Board of Podiatry Examiners); § 2-801 (Board of Examiners in Veterinary Medicine); § 2-903 (Board of Accountancy); and, §§ 2-1001, 2-1002 (Board of Examiners and Registrars of Architects).

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NO. 481

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

ELLIS CARP, ET AL.,

Appellants

vs.

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY, ET AL.,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

MOTION TO DISMISS OR AFFIRM

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INDEX

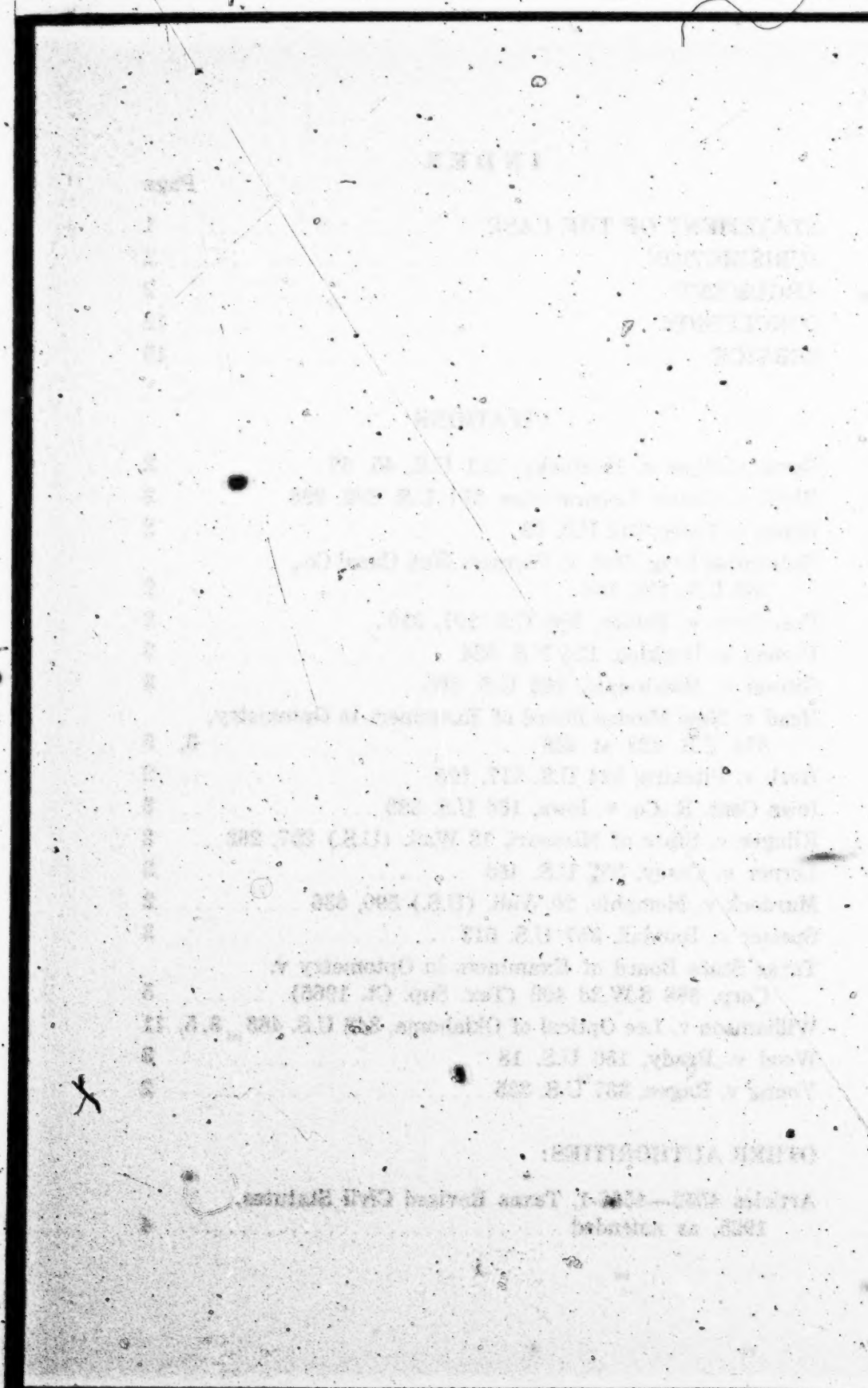
	Page
STATEMENT OF THE CASE	1
JURISDICTION	2
ARGUMENT	2
CONCLUSION	12
SERVICE	13

CITATIONS

Berea College v. Kentucky, 211 U.S. 45, 53	2
Black v. Cutter Laboratories, 351 U.S. 292, 298	2
Dixon v. Duffy, 342 U.S. 33	2
Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164	2
Fox Corp. v. Muller, 296 U.S. 207, 210	2
French v. Hopkins, 124 U.S. 524	3
Gibson v. Mississippi, 162 U.S. 565	3
Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 at 428	3, 5
Herb v. Pitcairn, 324 U.S. 117, 125	2
Iowa Cent. R. Co. v. Iowa, 160 U.S. 389	3
Klinger v. State of Missouri, 13 Wall. (U.S.) 257, 263	2
Lerner v. Casey, 357 U.S. 468	3
Murdock v. Memphis, 20 Wall. (U.S.) 590, 636	2
Speiser v. Randall, 357 U.S. 513	3
Texas State Board of Examiners in Optometry v. Carp, 388 S.W.2d 409 (Tex. Sup. Ct. 1965)	5
Williamson v. Lee Optical of Oklahoma, 348 U.S. 483	3, 5, 11
Wood v. Brady, 150 U.S. 18	3
Young v. Ragen, 337 U.S. 325	2

OTHER AUTHORITIES:

Articles 4552—4566-1, Texas Revised Civil Statutes, 1925, as amended	4



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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellee, Texas State Board of Examiners in Optometry, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves that this case be dismissed on the grounds that the case does not present a substantial federal question or in the alternative that the final judgment of the Supreme Court of Texas herein be affirmed or if the Jurisdictional Statement be treated as a petition for certiorari that the writ be denied. There are no substantial Federal questions in this case.

STATEMENT OF THE CASE

This action is an appeal by Appellants seeking a judgment declaring invalid the Professional Responsibility Rule adopted by the Texas State Board of Examiners in Optometry on December 21, 1959.

The facts of this case are stated in the opinion of the Supreme Court of the State of Texas which opinion, together with the dissenting opinion, is set forth in the appendix to the Appellants' Jurisdictional Statement at pp. 1a-26a and is reported at 412 S.W.2d 307 and in the opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, which opinion is set forth in the appendix of the Jurisdictional Statement at pp. 27a-38a and is reported at 401 S.W.2d 639.

JURISDICTION

It is questioned by Appellee, Texas State Board of Examiners in Optometry, that any substantial federal question is presented for adjudication by the Supreme Court of the United States. In the alternative, if the Jurisdictional Statement be treated as a petition for certiorari, Appellee contends that the writ should be denied. There are no substantial federal questions in this case.

ARGUMENT

The Supreme Court of the United States will not review judgments of state courts that rest on adequate and independent state grounds. *Black v. Cutter Laboratories*, 351 U.S. 292, 298; *Herb v. Pitcairn*, 324 U.S. 117, 125; *Klinger v. State of Missouri*, 13 Wall. (U.S.) 257, 263; *Murdock v. Memphis*, 20 Wall. (U.S.) 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164; *Fox Corp. v. Muller*, 296 U.S. 207, 210; *Dixon v. Duffy*, 342 U.S. 33; *Young v. Ragen*, 337 U.S. 325. Applying this principle to the instant case, the judgment of the Supreme Court of Texas rests on adequate and independent state grounds in that the

Supreme Court of Texas has merely passed upon the issue of whether a state administrative body, the Texas State Board of Examiners in Optometry, exceeded its statutory powers in promulgating the rule involved in this case pursuant to the statutes of the State of Texas.

The cases are clear that a decision of a state court resting on grounds of state procedure does not present a federal question. *French v. Hopkins*, 124 U.S. 524; *Iowa Cent. R. Co. v. Iowa*, 160 U.S. 389; *Gibson v. Mississippi*, 162 U.S. 565; *Wood v. Brady*, 150 U.S. 18. The cases are also equally clear that the construction of state laws is the exclusive responsibility of state courts. *Speiser v. Randall*, 357 U.S. 513; *Lerner v. Casey*, 357 U.S. 468. Applying the foregoing principles to the instant case, the Appellee respectfully submits that there is no substantial federal question presented. The judgment and decree of the Supreme Court of Texas rested on adequate and independent state grounds and therefore the questions here submitted are so unsubstantial as not to warrant further argument. The argument of Appellants has been rejected by this Court in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483; *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 at 428.

Appellants assert in their Jurisdictional Statement that the Professional Responsibility Rule of the Texas State Board of Examiners in Optometry which prohibits kickbacks, fee splitting, assumed names, and holding out of practitioners names on offices where they do not customarily practice, is invalid on grounds of due process and the Sherman Act. Each of these arguments is based on the erroneous premise that the Rule was established by private action and not by

official action of an administrative agency of the State of Texas. The record in this case does not support the premise. This Appellee, the Texas State Board of Examiners in Optometry, is an official administrative agency of the State of Texas established by statute in 1921 and performs its official duties pursuant to Articles 4552-4566-1, Texas Revised Civil Statutes, 1925, as amended, said Articles being chapter 10 of Title 71 of the Revised Civil Statutes of Texas, 1925, as amended, and the issue in this case as stated by the Supreme Court of Texas is whether the Board exceeded such statutory powers in promulgating the Professional Responsibility Rule. The Rule itself, which was adopted by the Texas State Board of Examiners in Optometry December 21, 1959, is set out in the record as Defendants' Exhibit 56 (S.F. 2843). Appellant N. J. Rogers signed the minutes reflecting the Board's action adopting the Rule in his official capacity as Vice President. It is also reflected in the record that numerous opportunities were given Appellants to voice their views during the prolonged consideration given this Rule by the Board (from September, 1954, through December 21, 1959). At the meeting of the Board on December 21, 1959, prior to taking its official action of adopting the Rule, the Board heard lengthy arguments by Messrs. Keith and Bergman against the adoption of the Rule, appearing before the Board on behalf of Appellants. These matters are all reflected by Defendants' Exhibit 56 and pages 421-26, 422, 815, and 2110-2113 of the Statement of Facts.

There are no questions of substantive due process in this case. Appellants licenses and practice are and always have been held and exercised subject to the police power of the State. As this Court recently ob-

served in *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 at 428, state measures in this precise area:

> ". . . falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. *Williamson v. Lee Optical Co.*, 348 U.S. 483."

The vast majority of the states have rules or statutes similar to this Rule (S.F. 2438-2683), and a host of state decisions referred to in the opinion of the Supreme Court of Texas affirmed that they are proper. 412 S.W.2d at 312.

At the end of an extremely lengthy trial of this plainly substantial-evidence case to the jury demanded by Appellants, that jury predictably hung. The extraordinary writ of mandamus was granted by the Texas Supreme Court, directing the trial court to enter judgment one way or the other. *Texas State Board of Examiners in Optometry v. Carp*, 388 S.W.2d 409 (Tex. Sup.Ct. 1965). Thereafter, judgment was rendered for Appellees.

Appellants chose the route of appeal to the Dallas Court of Civil Appeals, rather than direct to the Supreme Court of Texas. Rule 499-a, Texas Rules of Civil Procedure. In the Dallas Court of Civil Appeals Appellants lodged eight points of error. That court ruled in Appellants' favor on their first two points, which asserted only that the rule was beyond the Optometry Board's delegated authority under the Texas statutes involved. Articles 4556 and 4563, Revised Civil Statutes of Texas, 1925, as amended, granting the board rule-making power and defining certain offenses

of optometry practictioners. Appellants' other six points were expressly overruled; these contained the sole references to the issues sought to be raised here. The Dallas Court of Civil Appeals rendered judgment in favor of Appellants. Appellees then sought discretionary review in the Supreme Court of Texas, and there prevailed. In that court, Appellants abandoned and withdrew the sole element of any point here raised which they had made below—a complaint that the Rule-making procedure delegated the Board's rule-making power to "outsiders."

Rehearing was denied on March 29, 1965, and on April 4 the Texas Supreme Court granted Appellants a stay of mandate to June 27 to convenience them in this appeal. Sometime in middle June Appellants sought of Mr. Justice Black a further stay of enforcement of the Texas Supreme Court's judgment, which was denied on June 22, 1967. On June 26, 1967, a second attempt at a stay by Appellants was denied by Mr. Justice White, and on the following days the mandate of the Supreme Court of Texas issued.

Neither the Sherman Act nor the Supremacy Clause was referred to in the trial pleading, nor cited in any brief filed by Appellants in any State court herein, either in the mandamus action or in this case. In fact, Appellants affirmatively advised the Texas Supreme Court in the mandamus action that the conspiracy and restraint-of-trade complaints of the trial pleadings were complaints under Texas statutes stating: "What, in legal effect, was charged by the individual respondents in their pleadings was an actionable conspiracy under the Anti-Trust Laws of the State.," page 15 of Brief of Respondents, Ellis Carp, S. J. Rogers and N. J. Rogers, in the mandamus action.

The above appears at the commencement of thirteen pages of argument citing and discussing the Texas Constitution and Texas anti-trust laws and cases thereon. but containing not a reference anywhere to the Sherman Act or the Supremacy Clause. Having thus said nothing whatever about the United States anti-trust laws or the Supremacy Clause until Appellants got to this court and having briefed and argued the Texas Constitution and anti-trust statutes, it cannot now be asserted by Appellants that what they meant all along was the Sherman Act and that they raised and preserved it at every stage below (J.S. pp. 10-13).

Furthermore, during the trial Appellant N. J. Rogers testified as follows:

"Q All right. Doctor, let me ask you, do you feel that the members of the State Board, with whom you serve, and who elected you vice-president a while back, hold their views on this question of assumed name sincerely?

"A I would have to say that I would presume they did; I don't know any more than I know about any other single man, but I would presume they would fall in that same category of men that would hold that opinion sincerely.

"Q All right, sir, and you would be prepared to concede that their views on the trade name practice are, as far as you know, sincerely held?

"A Yes, I would certainly concede that.

"Q So that it may well be, and insofar as you know, is that the other members of the State Board who voted for the Professional Responsibility Rule forbidding trade name

practice did so because they sincerely thought it was the best thing for the people of Texas and for the profession of optometry, do you not, Doctor?

"A Yes." (S.F. 466-468).

Concerning the merits of the Professional Responsibility Rule, it is submitted that the Supreme Court of Texas accurately observed in its opinion below: "The necessity for such a rule was demonstrated by—the record which abounds with evidence of the specific evils the rule was designed to correct." 412 S.W.2d 307. Many illustrations are contained in the record in this case showing the accuracy of the above finding by the Texas Supreme Court in its opinion below. These illustrations are contained on pages 12-42 of our Application for Writ of Error filed in the Supreme Court of Texas in this case and need not be repeated at length here. However, we believe that a few references to the Statement of Facts is warranted.

Appellant, N. J. Rogers admitted that "there are arguments both ways" on the trade-name practice, a very significant admission indeed in a substantial evidence case (S.F. 466).

Evidence was introduced of the Appellants' Rogers consistent advertising policy of representing that one Texas State Optical examination reveals all about one's eyes, including specifically the presence or absence of glaucoma and other eye conditions causing blindness if left untreated, though N. J. Rogers himself testified that no one examination could detect glaucoma. (S.F. 1877-8, 1881-2, 378-80, 1921-2). The record also contains Dr. N. J. Rogers' memorandum

on examining children's eyes, circulated to his employed optometrists in 1959 and 1960, advising them to use the opthalmometer "since this is an impressive instrument" and ". . . to prescribe a correction which the patient can wear as much as possible so that the parent will not feel that the child could probably get along without them since the child wears them so little of the time." (S.F. 2293-99). At trial N. J. Rogers testified he had never seen some of his offices (S.F. 1876), did not know for sure how many were in the city where the case was tried (S.F. 333) or who serviced a particular office there (S.F. 495), and admitted that the equipment in his offices was not uniform (S.F. 39, 40); yet the keystone of his advertising policy was the virtue of "a scientific TSO eye examination" (S.F. 1886-8) at which "[I]f a defect or disease exists in the eye, the experienced Doctor of Optometry at TSO will detect it. Satisfaction guaranteed." (S.F. 1881-2). A trade name makes such practice possible. Testimony to this effect is in the record—that these and like practices are inherent in the trade-name practice and appear wherever it is allowed to go on. Dr. Judd Chapman, President of American Optometric Association (S.F. 690-1); Dr. Henry Hofstetter, O.D., Ph.D., (S.F. 751-2, 751-5, 775); Dr. Oscar Marchman, M.D. (S.F. 272-275); and Dr. E. A. Templeton, a former employee of the Drs. Rogers, whose entire testimony, commencing at S.F. 2283 and ending at S.F. 2297, is highly significant.

Similarly, the record reflects frequent telephone listings and office displays falsely indicating to the public that one or more of Appellants Rogers regularly and personally examined patients at various particular offices (just like the employed optometrist there

full time) when in fact Appellants Rogers had never been inside of some of these offices for years (S.F. 477-483, 1900-1904, 2197-2199; Plaintiffs' Ex. 28, Defendants' Ex. 6).

For his part Dr. Ellis Carp, the Court's other Appellant, was at the time of trial herein practicing in Wichita Falls, Texas, in three different offices with three different names, all within a two-block radius of each other—Mast Optical, Luck Optical and Lee Optical—which he held out as totally distinct, selling the same glasses as Mast glasses at $14.50, Luck glasses for $14.90 and Lee glasses for $12.90—while advertising on behalf of Lee "Why pay $14.50, $16.50, $20.00 or even more for glasses?" (S.F. 1706). Appellant Carp admitted, of course, that the supervision, optical materials, equipment, and often even the examining optometrists were all the same—the only difference was name and price. (S.F. 1631-34). A similar situation existed in Dr. Carp's El Paso operation, the names there being Luck, Mesa and Lee (S.F. 1637-43, 1648, 1650-1). In Texas Dr. Carp has used, and discarded the names of Plains Optical, Amarillo Optical, Lubbock Optical, Panhandle Optical, Mission Optical, Douglas Optical, Shannon Optical, and Pearl Optical. (S.F. 1658-1660, 1573-5). A final note which shows a vice inherent in trade-name practice of a profession: about the time of trial there was practicing in the Dallas-Fort Worth area one Dr. L. H. Luck. Dr. Carp had bought offices from him and was practicing there in the name of Dr. Luck (or Luck One Price Optical). (S.F. 1597-8, 1649, 1657). The Appellants Rogers had done likewise (S.F. 376, 458). And so during recent years in that area there have been not less than three different groups practicing optometry in the Luck

name, at least two at the same time (S.F. 1649, 1657) and perhaps all three: all of the Court's appellants and Dr. Luck himself.

We feel that the above references to the Statement of Facts is sufficient to show that the evidence demonstrates the evils found to be inherent in trade-name practice. The Professional Responsibility Rule adopted by the Texas State Board of Examiners in Optometry is, therefore, in the precise area held by this Court to be subject to the police power of the State. *Williamson v. Lee Optical Company,* 348 U.S. 483.

The Supreme Court of Texas has determined that the adoption of the Professional Responsibility Rule by the Texas State Board of Examiners in Optometry on December 21, 1959, constituted a valid exercise of its statutory powers under state law. Thus, the decision by the Supreme Court of Texas rested on adequate and independent state grounds and, therefore, the questions here submitted are so unsubstantial as not to warrant further argument.

CONCLUSION

We respectfully submit, therefore, that Appellants have not presented any substantial federal question for adjudication of the Supreme Court of the United States. The appeal should be dismissed or the judgment and decree of the Supreme Court of Texas should be affirmed. In the alternative, if the Jurisdictional Statement be treated as a petition for certiorari, the writ should be denied.

Respectfully submitted,

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SERVICE

I, George M. Cowden, First Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Motion has been forwarded by United States Mail, First Class, postage pre-paid, to Appellants' attorneys, Thurman Arnold, Robert E. Herzstein, Brooksley Landau, 1229 - 19th Street, N.W., Washington, D. C.; Douglas E. Bergman, 1512 Mercantile Bank Building, Dallas, Texas; Quentin Keith, San Jacinto Building, Beaumont, Texas; Arnold & Porter, 1229 - 19th Street, N.W., Washington, D.C.; Price Daniel, Brown Building, Austin, Texas; Jake Jacobsen, Westgate Building, Austin, Texas.

GEORGE M. COWDEN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CARP ET AL. *v.* TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 481. Decided October 23, 1967.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.